

Bridging the Gap Between the Rules of Evidence and Justice for Victims of Domestic Violence[†]

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[†] This piece is dedicated to the memory of Dominique Dunne.

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PROLOGUE

Approximately two years ago, I began researching the area of the admissibility of uncharged act evidence in domestic violence prosecutions. I found the state of the law to be less than satisfying.

At that time, Federal Rules of Evidence 413-415,¹ dealing with uncharged act evidence in sexual assault and molestation cases, had just been passed by Congress, and were being considered by the Judicial Conference. Excited by the approach taken at the federal level, I set out to make a similar change in domestic violence prosecutions. Living and working in California, I decided to focus on California, in hopes that if I was successful, other states would soon follow suit.

I drafted proposed legislation for California that would allow into evidence uncharged acts of domestic violence in domestic violence prosecutions. I modeled my proposal on the approach taken at the federal level with respect to sexual assault and child molestation. I also analyzed the criticisms of the federal approach in order to develop the best proposal possible.

In January of 1996, I completed my proposal and began searching for both a California legislator who would author it as a 1996 bill and organizations to support the proposal. I soon joined forces with the California Alliance Against Domestic Violence,² a statewide, grassroots coalition representing the interests of battered women and their children. The Alliance was already considering sponsoring a bill, Senate Bill 1876, that proposed to broaden California Evidence Code section 1101(b).³

Senate Bill 1876 had been authored by Senator Hilda L. Solis, and was being sponsored by James K. Hahn, the Los Angeles City Attorney, and his office. I met with a representative of the Los Angeles City Attorney's Office, Deputy City Attorney Alana Bowman,⁴ and we found our proposals to be complementary. Deputy Bowman then recommended amending Senate Bill 1876 to include my proposal, and Senator Hilda L. Solis agreed.⁵ Additionally, The Alliance officially backed the bill in its newly amended form.

1. See *infra* note 42 and accompanying text.

2. Hereinafter "The Alliance."

3. See *infra* notes 96-99 and accompanying text. See *infra* Appendix C for text of Senate Bill 1876 in original form.

4. Deputy City Attorney Alana Bowman is the supervisor of the Domestic Violence Unit at the Los Angeles City Attorney's Office, where approximately 20,000 cases of domestic violence are prosecuted annually.

5. See *infra* Appendix D.

My original proposal⁶ was modified by David J. Karp⁷ to conform to California Evidence Code section 1108. California Evidence Code section 1108 is the California version of the Federal Rules of Evidence 413-415. Additionally, in accordance with the trend in California domestic violence legislation, the California Family Code section 6211 definition of "domestic violence" was used.⁸ As modified, the proposal became Senate Bill 1876, part two.

In its final form, Senate Bill 1876 was carried by the Honorable Senator Hilda L. Solos and co-authored by Senators Ray Haynes, Tim Leslie, and Diane Watson, and by Assembly Members Paula Boland and Sheila Kuehl. The Alliance and the Los Angeles City Attorney's Office, represented by Alana Bowman, sponsored the bill. It was also supported by the Attorney General's Office, represented by Kevin P. Holsclaw, The California District Attorney's Association, represented by Greg Totten and Larry Brown, several law enforcement agencies, and countless battered women's services agencies.

The bill underwent several changes at the committee level of the legislative process. One minor change arose out of the first Senate hearing, which occurred before the Committee on Criminal Procedure.⁹ At the next hearing, which was before the Senate Judiciary Committee, several major changes were made.

In the Senate Judiciary Committee, part one of the bill was completely eliminated. Part two of the bill was also modified. First, the definition of "domestic violence" was narrowed from the Family Code section 6211 definition to the Penal Code section 13700 definition.¹⁰ This change

6. See *infra* Appendix A.

7. Mr. Karp drafted Federal Rules of Evidence 413-415 and contributed to the formulation of California Evidence Code section 1108. Mr. Karp is Senior Counsel for the Office of Policy Development at the United States Department of Justice, but participated in Senate Bill 1876 in his personal capacity.

8. "Domestic violence" is abuse perpetrated against any of the following persons:

- (a) A spouse or former spouse.
- (b) A cohabitant or former cohabitant, as defined in Section 6209.
- (c) A person with whom the respondent is having or has had a dating or engagement relationship.
- (d) A person with whom the respondent has had a child, where the presumption applies that the male parent is the father of the child of the female parent under the Uniform Parentage Act (Part 3 (commencing with Section 7600) of Division 12).
- (e) A child of a party or a child who is the subject of an action under the Uniform Parentage Act, where the presumption applies that the male parent is the father of the child to be protected.
- (f) Any other person related by consanguinity or affinity within the second degree.

CAL. FAM. CODE § 6211 (West 1994).

9. See CAL. EVID. CODE § 1101(b)(2) (West 1995). "[C]onduct against a particular individual" was changed to "conduct against the victim of the charged crime." *Id.*

- 10. (a) "Abuse" means intentionally or recklessly causing or attempting to cause bodily injury, or placing another person in reasonable apprehension of imminent serious bodily injury to himself or herself, or another.
- (b) "Domestic violence" means abuse committed against an adult or a fully emancipated minor who is a spouse, former spouse, cohabitant, former cohabitant, or person with whom the suspect has had a child or is having or has had a dating or engagement relationship. For purposes of this subdivision, "cohabitant" means two unrelated adult persons living together for a substantial period of time, resulting in

eliminated children from the purview of "domestic violence" as used in the bill. Additionally, a restriction was added to section two, which narrowed the admissibility of evidence of domestic violence occurring more than ten years before the charged offense. Under the restriction, such evidence is presumed inadmissible unless the court determines that the admission is in the "interest of justice."¹¹ Although these amendments were contrary to the will of the author, Senator Hilda L. Solis, they were necessary to the life of the bill.

The final hearing was in the Assembly Committee of Public Safety. In this committee, the bill received a very positive and thoughtful analysis, written by Committee Analyst Jennifer Anderson. No amendments were made at this hearing.

Thanks to the unending dedication and passion of all of the above mentioned individuals and agencies, particularly the tremendous efforts of Senator Hilda L. Solis' legislative aides, Dolores Duran and Giannina Perez, and the insightful testimony of David J. Karp, Senate Bill 1876 was passed by the California Legislature and signed by Governor Pete Wilson on July 22, 1996. Although part one of Senate Bill 1876 did not survive the committee hearings and part two was modified from its original form, the overall success of the bill shows a growing awareness of and dedication to bridging the gap between the rules of evidence and justice for victims of domestic violence.

Although the change has already been made in California the need for this change has not been documented and analyzed in an academic piece.¹² What follows is my proposal in its original form. My proposal examines the need for the bill and addresses the criticisms of its approach. Although the article focuses on California law, I hope that it will serve as a model for proposing similar changes in other states.

INTRODUCTION

Smashing the furniture and throwing the dishes were the first signs of his violence.¹³ After relaying the incident to her mother, she convinced both her mother and herself that although he may have a horrible temper, he would never hurt her. But he did in fact hurt her; it hurt her when he ripped out tufts of her hair from her head. This time she left him, and went to live with her mother. Following this incident, he promised her that he would attend therapy.

some permanency of relationship. Factors that may determine whether persons are cohabitating include, but are not limited to, (1) sexual relations between the parties while sharing the same living quarters, (2) sharing of income or expenses, (3) joint use or ownership of property, (4) whether the parties hold themselves out as husband and wife, (5) the continuity of the relationship, and (6) the length of the relationship.

CAL. PENAL CODE §13700 (West 1994).

11. See *infra* Appendix E for final version of Senate Bill 1876.

12. Senator Hilda L. Solis, however, expressed the intent of the legislation in her letter to the Secretary of the Senate. See SENATE JOURNAL SB1876 (daily ed. Aug. 22, 1996).

13. See Roxane Arnold, *Srrangled Actress: Did Slayer's Penalty Fit His Crime?*, L.A. TIMES, Dec. 3, 1986, § 1, at 30.

With heart-felt apologies and flowers, he persuaded her to return to him. They attended therapy together, but the violence nevertheless escalated. About three weeks later, he gave her a necklace. But this was not a necklace of diamonds or pearls; it was a necklace of bruises encircling her neck. A witness reported hearing the fighting, and said that the man sounded "jealous" about something.¹⁴ He also reported hearing a "clunk" and a woman gasping. The witness said the gasping was the most horrendous sound he had ever heard in his life.¹⁵ The couple separated again, but the violence did not end until he had taken her life.

The night of her death she had told him that their separation was permanent, and that she did not love him. The witness reported screaming. The man put his hands around her neck, squeezed, and for four to six minutes watched as he slowly took her life. When the police arrived she was in a coma and was declared brain dead.¹⁶ Five days later she was removed from the life-support system.¹⁷ Three years, seven months, and twenty-seven days later, he was out of the medium-security prison to which he had been sentenced and back on his career track. He was re-employed as the head chef at the chic Santa Monica restaurant, The Chronicle.¹⁸

The murder probably would have gone without even a remark in a local paper except for the fact that the victim was Dominique Dunne. Dunne was a beautiful young actress who was featured in the film "Poltergeist," and was the only daughter of Dominick Dunne and Ellen Griffin Dunne. She was also the niece of the acclaimed authors John Gregory Dunne and Joan Didion.¹⁹ Other than the victim's celebrity status, the horrors described above are unfortunately not unique.

Because Dunne was an actress from a celebrity family, the trial was highly publicized. Although the exclusionary rulings brought cries of outrage, they were also not unusual. These exclusionary rulings meant that the full context of the homicide was not revealed to the jurors. Thus they returned a finding of voluntary manslaughter.²⁰ However, the defendant, John Sweeney, did not commit this crime in a sudden isolated incident of rage, as the voluntary manslaughter finding would indicate. Rather, Sweeney's usual pattern of relating to his intimate partners included controlling them with violence.

Dunne was not Sweeney's first victim. Though she escaped with her life, Sweeney's former live-in girlfriend was beaten by him on at least ten occasions and hospitalized twice during their two year, severely violent relationship.²¹

14. *Id.*

15. *See id.* at 31.

16. *See* DOMINICK DUNNE, *Justice: A Father's Account of the Trial of His Daughter's Killer*, in FATAL CHARMS AND OTHER TALES OF TODAY 1, 26 (1987).

17. *See id.*

18. *See* Arnold, *supra* note 13, at 30.

19. *See id.*

20. *See* DUNNE, *supra* note 16, at 25, 36.

21. *See id.* at 21-22.

Although this woman was available to testify, and did testify out of the presence of the jury, the evidence was held inadmissible.²² The jury never heard that Sweeney broke his former girlfriend's nose.²³ They were not told that Sweeney had punctured her eardrum.²⁴ The jury never knew that Sweeney was responsible for collapsing his former girlfriend's lung.²⁵ All of the above evidence was held "too prejudicial" for the jury to evaluate, and was thus excluded under California Evidence Code section 352.²⁶

Steven Barshop, Deputy District Attorney of the Los Angeles County District Attorney's Office, who argued the case, fiercely disagreed with the judge's ruling. At the time, he commented that "evidence that is admissible decides cases."²⁷ In a recent telephone interview, Barshop expressed similar sentiments: "When you keep the jury in a vacuum, they are unable to resolve the case."²⁸ He further supported this statement by relating a story about a recent domestic violence homicide that he tried twice. In the first case, the uncharged acts were held inadmissible.²⁹ The jury hung on a *second* degree murder charge.³⁰ He retried the case, and this time the uncharged acts were admitted.³¹ In only three hours, the jury returned with a finding of *first* degree murder.³² This example shows how important it is to be able to present the jurors with the full context and history of the violence when trying a domestic violence case.

Typically, a jury is shielded from ever learning of evidence that was excluded. Because of the high profile of the Dominique Dunne case, the press was quick to inform the jurors of the uncharged offenses that were excluded from the evidence they evaluated.³³ In a television interview, Paul Spiegel, foreman of the jury, said he felt that "justice had not been served."³⁴ Spiegel thought that "the jury would certainly have found Sweeney guilty [of murder] if they had heard all of the evidence."³⁵

Even Burton S. Katz, the judge who made and fiercely defended these exclusionary rulings, was troubled by the gap between following the law and serving justice. After the case he stated, "[u]nfortunately, following the letter of the law sometimes doesn't permit one to pursue the ultimate goal of justice

22. *See id.* at 25.

23. *See id.* at 22.

24. *See id.*

25. *See id.*

26. *See id.* at 25; Telephone Interview with Steven Barshop, Deputy District Attorney for the L.A. District Attorney's Office (Mar. 27, 1995); CAL. EVID. CODE § 352 (West 1995).

27. Arnold, *supra* note 13, at 31.

28. Interview with Steven Barshop, *supra* note 26.

29. *See id.*

30. *See id.*

31. *See id.*

32. *See id.*

33. *See* DUNNE, *supra* note 16, at 37-38.

34. *Id.* at 41.

35. *Id.*

. . . . Three and a half years for a life is certainly not justice.”³⁶ Judge Katz did, however, espouse the standard rationalization for this type of exclusionary ruling, saying, “[t]he law says . . . you judge a person for his acts . . . and not for the kind of person he has been in the past You don’t convict a person because they’re bad people [sic]. You don’t convict a person because they’ve done something bad in the past.”³⁷ Nonetheless, Katz admitted that these rulings personally “pained” him.³⁸ Drained by this and other murder cases, Judge Katz moved to a juvenile court.³⁹

The Dominique Dunne case was unfortunately not unique. It is likely that similar rulings are made over and over in cases where batterers are prosecuted for domestic violence assaults and homicides.⁴⁰ The time has come to bridge the gap between following the rules of evidence and serving justice for victims of domestic violence. I propose that the best way to accomplish this goal is to create a specialized evidentiary rule for the admissibility of uncharged offenses of domestic violence in domestic violence prosecutions.⁴¹ The proposed evidentiary rule is based on the new Federal Rules of Evidence 413-414, which accomplish the same for victims of rape and sexual molestation.⁴²

First, in order to give the reader an understanding of the need for this legislation, I will discuss the difficulties that prosecutors face when they are prosecuting domestic violence cases. Second, I will explain the inadequacy of the current scheme of admissibility for admitting uncharged acts of domestic violence in domestic violence prosecutions. Third, I will review the recent changes in the federal law regarding sexual assault cases. I will address both the proponents’ and critics’ arguments. Finally, I will propose a similar approach for domestic violence cases. I will offer arguments in favor of such a solution and will also address likely criticisms.

36. Arnold, *supra* note 13, at 30.

37. *Id.*

38. *Id.*

39. *See id.*

40. There are very few published cases that deal with the admissibility of prior acts of domestic violence. The absence of such cases is likely due to the fact that the current scheme of admissibility works in favor of the defendant and therefore very few of these cases are appealed. *See infra* notes 204-06 and accompanying text.

41. *See infra* Appendix A.

42. *See New Federal Evidence Rules are Mandated by 1994 Crime Bill*, 63 U.S.L.W. § 2 (Sept. 3, 1994); *see also* CAL. EVID. CODE § 1108 (West 1995) (modeled on FED. R. EVID. 414-415).

I. INTRODUCTION TO DOMESTIC VIOLENCE AND ADMISSIBILITY

A. *The Difficulties with Prosecuting Domestic Violence*

Prosecuting domestic violence crimes is extremely difficult.⁴³ There are two categories of problems that arise within the prosecution of a domestic violence case. First, there are the hurdles of preparing a case for trial. These include issues such as uncooperative or recanting victims and witnesses, a lack of witnesses, and a lack of documented physical evidence. There are also problems that occur at the trial. These include a juror's "belief in a just world,"⁴⁴ uninformed and prejudicial views about domestic violence and its victims,⁴⁵ and gender bias.⁴⁶ The combined impact of case preparation and trial problems make the prosecution and conviction of batterers a daunting task.

In prosecuting a crime of domestic violence, testimony from the victim, which details the crime committed upon her⁴⁷ and identifies the perpetrator, is the "single most important piece of evidence."⁴⁸ In general, victims of stranger assaults are eager to come forth with this information. However, victims of domestic violence are uncooperative in approximately eighty to ninety percent of cases.⁴⁹ Many victims are uncooperative from the initial

43. For a broad introduction to domestic violence dynamics, law, and prosecution, from a variety of perspectives, see generally NANCY K.D. LEMON, *DOMESTIC VIOLENCE LAW: A COMPREHENSIVE OVERVIEW OF CASES AND SOURCES* (1996).

44. "Belief in a Just World" is a psychological phenomenon affecting people's willingness to accept that heinous events can happen without good cause. Deborah L. Rhode, *The No-Problem Problem: Feminist Challenges and Cultural Change*, 100 YALE L.J. 1731, 1737 (1991) (citing MELVIN J. LERNER, *THE BELIEF IN A JUST WORLD: A FUNDAMENTAL DELUSION* at vii-viii (1980)).

45. LENORE E. WALKER, *THE BATTERED WOMAN* 18-31 (1979).

46. I focus here on a *juror's* gender bias. However, it should be noted that judges, defense attorneys, and prosecutors themselves also exhibit gender bias. Judge Cahill's statements regarding Kenneth Peacock, who shot and killed his wife after he found her in bed with someone else, provides an extreme example: "I seriously wonder how many married men . . . would have the strength to walk away . . . without inflicting some corporal punishment, whatever that punishment might be. I shudder to think what I would do." *United States: Judicial Misconduct in the State of Maryland—The Peacock Case*, 7 EQUALITY NOW: WOMEN'S ACTION (National Clearinghouse for the Defense of Battered Women), Dec. 1994; see also CALIFORNIA JUDICIAL COUNCIL ADVISORY COMMITTEE ON GENDER BIAS IN THE COURTS, *ACHIEVING EQUAL JUSTICE FOR MEN AND WOMEN IN THE COURTS* § 2, at 3 (1990) [hereinafter JUDICIAL COUNCIL ADVISORY COMMITTEE] (defining gender bias as "(1) stereotypical attitudes about the nature and roles of women and men; (2) cultural perceptions of their relative worth; (3) myths and misconceptions about the social and economic realities encountered by both sexes").

47. Since women are the victims in 95% of domestic violence cases between spouses, I will use the female pronoun to refer to victims, and the male pronoun to refer to batterers. See generally BUREAU OF JUSTICE STATISTICS, *REPORT TO THE NATION ON CRIME AND JUSTICE: THE DATA* (1983).

48. Telephone Interview with Susan Breall, Assistant District Attorney with the Domestic Violence Unit of the San Francisco District Attorney's Office (Mar. 28, 1995) (explaining that without this evidence, at least one juror will usually think that the victim has not testified because she *does not care enough* to come to court).

49. Telephone Interview with Candace Heisler, Supervising Assistant District Attorney of the San Francisco District Attorney's Office (Sept. 29, 1995) (explaining that she receives information from a number of experts around the country; the figure includes victims who are uncooperative, who recant, who refuse, or are reluctant to cooperate). Furthermore, only 11-24% of victims of intimate violence reported the incident to *punish* the offender. See NATIONAL CLEARINGHOUSE FOR THE DEFENSE OF BATTERED WOMEN, *STATISTICS PACKET: 3RD EDITION* (Feb. 1994) (citing Carolyn Harlow, BUREAU OF JUSTICE STATISTICS, *FEMALE VICTIMS OF VIOLENT CRIME* 3 (Jan. 1991)); KRISTINA ROSE & JANET GOSS, BUREAU

filing of the case, and some of those who are initially cooperative become uncooperative. The latter situation can occur at any point in the prosecution, and the victim will usually recant her prior statements at that time, leaving the prosecutor without that "single most important piece of evidence."⁵⁰ Depending on the jurisdiction and its policies, this may or may not mean that the case is dismissed. Increasingly, offices are using a "no drop" policy in which the case will continue as long as there is some other evidence with which to present the case. However, there are still some counties such as Fresno, where the prosecutors follow the express wishes of the victim and refrain from filing charges where the victim expresses an interest in "keeping the family intact."⁵¹

Victim non-cooperation stems from a multitude of sources, including fear. Most domestic violence victims have been frequently threatened by the batterer and understand that police departments are often not equipped to protect them against a truly obsessed defendant.⁵² If the victim has children, she may fear that her cooperation in the prosecution may result in the loss of her children through kidnapping, violence, or a custody battle.⁵³ The victim may also fear that the defendant will carry out his threats to harm or kill her family members, friends and/or pets.⁵⁴

Victims of domestic violence may refuse to cooperate in their batterer's prosecution for economic reasons. "When a battered woman leaves her abuser, there is a 50% chance that her standard of living will drop below the poverty line."⁵⁵ Although victims are often financially dependent on their batterers, it is a myth to think that being "cut off" is the only form of economic harm a

OF JUSTICE STATISTICS 8-9 (1989) (emphasis added).

50. Interview with Susan Breall, *supra* note 48.

51. See Bettina Boxall and Frederick Muir, *Prosecutors Taking Harder Line Toward Spouse Abuse*, L.A. TIMES, July 11, 1994, at A1.

52. See Martha Mahoney, *Legal Images of Battered Women*, 90 MICH. L. REV. 1 (1991) (explaining the phenomenon of separation assault); see also NATIONAL CLEARINGHOUSE FOR THE DEFENSE OF BATTERED WOMEN, STATISTICS PACKET (3d ed. Feb. 1994) ("A study of family violence using the National Crime Survey data shows that in almost 75% of spouse-on-spouse assaults, the victim was divorced or separated at the time of the incident.") (citing BUREAU OF JUSTICE STATISTICS, REPORT TO THE NATION 3 (3d ed. Mar. 1988)).

53. "Violent fathers are quite successful in winning custody of their children: in one study 59% of the judicially successful fathers had physically abused their wives; 36% had kidnapped their children." NATIONAL CLEARINGHOUSE FOR THE DEFENSE OF BATTERED WOMEN, *supra* note 52, at 39-40 (citation omitted).

54. Patricia Evans filed for divorce but her husband kept coming back to beat her with a dog chain, pistol whip her, and shoot at her. At last, after she had been hospitalized seven times, she shot him. Patricia Gross' husband tracked her from Michigan to Mississippi and threatened to kill her relatives there to force her to return to him. Mary McGuire's husband, teaching submission, made her watch him dig her grave, kill the family cat, and decapitate a pet horse. When she fled he brought her back with a gun held to her child's head. Agnes Scott's husband found her and cut her up seven years after she left him. There are cases on record of men still harassing and beating their wives twenty-five years after the wives left them and tried to go into hiding.

Id. (citing ANN JONES, WOMEN WHO KILL 298-99 (1980)).

55. *Id.* (citing *Women and Violence: Hearings Before the U.S. Senate Judiciary Comm.*, 101st Cong. 95 (1990)).

batterer can impose on his victim.⁵⁶ For example, a batterer will often harass a victim at her place of work, until her employer terminates her from her position. He may refuse to pay his portion of child support. He may make false reports of fraud to the Welfare Department to create obstacles to her lawful receipt of public assistance. He may destroy her property, including her home and car. He may harass and annoy her neighbors, until her landlord terminates her rental agreement. He may threaten the children's caregiver, until the caregiver refuses to care for the children. Victims of domestic violence often experience these economic threats and harms and know that there is rarely any practical legal recourse. Thus, a victim's decision not to cooperate in her batterer's prosecution may simply be a rational economic choice.

Additionally, victims may cease cooperating with the prosecution due to a reconciliation or hope for reconciliation with the batterer. The cycle of violence, as explained by Lenore Walker, has three phases.⁵⁷ Phase one involves a period of tension building. There may be minor incidents of battering where the victim tries to cope by avoiding and/or pacifying the defendant.⁵⁸ During this phase, the victim may try to deny what she knows is inevitable in the future, in order to cope with the present.⁵⁹ The next phase is that of the explosion or the acute battering incident.⁶⁰ This phase may last several minutes or several days. At its culmination, the victim may flee, seek medical treatment, call the police, etc. If a report is made, by the time that police report is filed with the district attorney's office, and the victim's cooperation becomes necessary, the victim is usually moving into phase three, the honeymoon.⁶¹ The honeymoon phase is the time when the batterer seeks forgiveness. He may be apologetic, promise to refrain from using violence in the future, and promise to seek therapy. He may shower her with gifts, love letters, romantic gestures and affection.⁶² The degree of sincerity during this phase differs from batterer to batterer. For some, this is a time of deep regret for their behavior, even though it is usually fleeting. For others, it is merely a tactic of manipulation. Regardless of the degree of sincerity, it is this unfortunate collision between the prosecution and the honeymoon stage that often causes initially cooperative victims to become uncooperative.⁶³ In fact, after the onset of the honeymoon, many victims actively work against the

56. Based on my experiences working with battered women at the Family Violence Law Center (October 1992 through May 1993 and August 1994 through December 1994) and at several District Attorney's offices throughout California, I have found battered women to be economically harmed by their batterers in a variety of ways.

57. See WALKER, *supra* note 45, at 55. It should be noted that although this is a very useful model, it does not fit every case of domestic violence.

58. See *id.* at 56-59.

59. See *id.*

60. See *id.* at 59-65.

61. It should be noted that not all violent relationships have a honeymoon phase.

62. See WALKER, *supra* note 45, at 65-70.

63. See *id.*

prosecution by cooperating with the defense attorney, hiring a defense attorney, or posting bail for the batterer's release.⁶⁴

Victims of color and gay and lesbian victims face additional issues which may inhibit their cooperation with law enforcement. First, they may face internal community pressure to excuse the violence, or to rationalize it as a product of the very real racism, heterosexism, and blocked opportunity faced by many minority groups.⁶⁵ Second, they may feel that cooperating with law enforcement is a breach of loyalty to their own community.⁶⁶ Victims of color may rightly fear that relying upon such institutions and publicizing the violence will only lead to further racism and stereotyping of their community.⁶⁷ Gay and lesbian victims may rightly fear that hatred of gays, lesbians, and bisexuals will be fueled by public awareness of domestic violence within their communities.⁶⁸ Finally, although great efforts have been made within the domestic violence movement and law enforcement to become more sensitive to the different cultures and sexual orientations of victims, victims of color and gay and lesbian victims still describe reaching out for help to find even less sympathy, support, and protection than that given to the Caucasian, heterosexual, female victim.⁶⁹ These internal and external pressures and prejudices further discourage these victims from fully cooperating in the arrests and prosecutions of their batterers.

Another problem the prosecutor faces at the case preparation phase is the lack of witnesses. Domestic violence is a crime that usually occurs in the home. Therefore there are rarely any witnesses to give a statement. Although children may witness battering incidents, there are special problems and considerations that arise from their testimony, not the least of which is the

64. Cf. *supra* note 49 and accompanying text (reporting that 80-90% of domestic violence victims are uncooperative in some way). It has been my experience, working at the Alameda, Los Angeles, and San Francisco District Attorney's offices, that victims of domestic violence oftentimes cooperate with the defense attorney, hire the defense attorney, and post bail for the defendant's release. I was employed at Alameda from August through December 1995, at Los Angeles from June through August 1995, and at San Francisco from June through August 1994.

65. See Claire M. Renzetti, *Violence in Interpersonal Relationships: A Preliminary Analysis of Causal Factors*, J. INTERPERSONAL VIOLENCE, Dec. 1988, at 381, 397; see also Soraya M. Coley & Joyce O. Beckett, *Black Battered Women: Practice Issues*, 69 SOC. CASEWORK: J. OF CONTEMP. SOC. WORK 483 (1988); Mahoney, *supra* note 52, at 12; Ruthann Robson, *Lavender Bruises: Intra-Lesbian Violence, Law and Lesbian Legal Theory*, 20 GOLDEN GATE U. L. REV. 567 (1990).

66. See Robson, *supra* note 65.

67. See generally Jenny Rivera, *Domestic Violence Against Latinas by Latino Males: An Analysis of Race, National Origin, and Gender Differentials*, 14 B.C. THIRD WORLD L.J. 231 (1994).

68. See David Island & Patrick Letellier, *The Scourge of Domestic Violence*, GAYBOOK, Spring/Summer 1990, at 11, 12 (explaining that after calling the police for help, gay and lesbian victims and batterers may face verbal abuse, homophobia, and homohatred); Renzetti, *supra* note 65, at 397; see also Robson, *supra* note 65, at 56; Mahoney, *supra* note 52, at 12; Rivera, *supra* note 67, at 231; Beth Richie, *Battered Black Women: A Challenge for the Black Community*, THE BLACK SCHOLAR, Mar.-Apr. 1985, at 40-41.

69. See Richie, *supra* note 68, at 40-41; Rivera, *supra* note 67, at 231 (1994); see also Island & Letellier, *supra* note 68, at 12 (explaining that after calling the police for help, gay and lesbian victims and batterers may face verbal abuse, homophobia, and homohatred).

emotional impact testifying may have on them.⁷⁰ Neighbors often hear battering incidents, but usually do not want to become involved. When there are witnesses to the violence, they may know both parties and feel conflicted about testifying against the defendant. Moreover, because witnesses are usually acquaintances of the defendant, the defendant is likely to know their addresses and places of work. Potential witnesses may be uncooperative based on their fears of retaliation.⁷¹

Typically, prosecutors are also faced with a lack of documented physical evidence. Victims often refuse medical attention for their injuries, and even when they do receive treatment, they may not admit the source of the injury to the medical caregiver.⁷² When police reports are taken, they may be anything from a few sentences to a full-blown report. Depending upon the policies of the responding police department, and the attitude of the particular responding officer, photos and statements may or may not be taken.⁷³ Even in the best case scenario, where a full-blown report and Polaroid photos are taken, photos may fade before trial or may not adequately represent the injuries. Bruising may not appear for several hours or even days after the incident. The quality of the photos may not capture the injury, or there simply may be no visible or physical injury to be photographed.

Once a prosecutor overcomes the pre-trial hurdles, when she walks into the courtroom, the second set of problems arises.⁷⁴ First, jurors, like all members of society, would much rather believe that heinous crimes do not happen, and that at the very least, they do not happen without good cause. Social psychologists have labeled the broader phenomenon from which this stems a "belief in a just world."⁷⁵ Thus, the jury is predisposed to want this charge of violence to be a mistake, a misunderstanding, an accident, or a lie. Psychologically, jurors would rather believe the defense theory of self-defense, accident, or lying victim, than find that the victim's account is true.

The pre-existing relationship between the parties in a domestic violence case feeds this phenomenon. For example, female jurors who may

70. See JANET CARTER ET AL., DOMESTIC VIOLENCE: THE CRUCIAL ROLE OF THE JUDGE IN CRIMINAL COURT CASES, A NATIONAL MODEL FOR JUDICIAL EDUCATION 112 (1991).

71. See LISA G. LERMAN, PROSECUTION OF SPOUSE ABUSE: INNOVATIONS IN CRIMINAL JUSTICE RESPONSE 19 n.17 (1981).

72. "[E]ven when confronted directly by medical personnel or other helping professionals, battered women often will not admit to the battering because they have not admitted to themselves that they are battered." NATIONAL CLEARINGHOUSE FOR THE DEFENSE OF BATTERED WOMEN, *supra* note 49 (citation omitted).

73. Telephone Interview with Sergeant Garrick, Investigator for the San Francisco Police Department's Domestic Violence Unit (Dec. 18, 1995) (explaining his department's "General Order 6.09," which details proper responses to domestic violence calls; this order includes taking statements from victims and witnesses when arrests are made and taking photos where there are injuries and cameras are available).

74. For a detailed discussion of juror bias, see Alana Bowman, *A Matter of Justice: Overcoming Juror Bias in Prosecutions of Batterers Through Expert Witness Testimony of the Common Experiences of Battered Women*, 2 S. CAL. REV. L. & WOMEN'S STUD. 219 (1992).

75. See Rhode, *supra* note 44, at 1737.

subconsciously fear that they could be the next victim of this type of crime⁷⁶ may feel a heightened need to distance themselves from the victim. The easiest way to accomplish this distancing is to label the *victim's* behavior as the cause of the violence. Similarly, male jurors have an interest in believing that the victim is lying or mistaken. Believing that domestic violence is a rare act, "attributable only to monsters" allows them to avoid any "reexamination of their own lives."⁷⁷

Another manifestation of "belief in a just world" in the domestic violence context is a juror's resistance to envisioning the defendant committing the alleged offense. Because batterers often are charming and well versed in manipulation tactics, they can make excellent witnesses who actually help jurors draw on their "belief in a just world." For example, batterers often testify in a calm and collected manner that the victim was injured due to her drug or alcohol use, or that she became hysterical and needed to be restrained.⁷⁸ Jurors may also rely on a defendant's position in society to deny the possibility that he committed the crime.⁷⁹ For example, a juror may find it completely inconceivable that a religious person or a city councilperson could batter his partner. Even if the batterer does not testify, he will likely appear well-groomed and poised at the trial. Unless the defendant is drooling and unkempt, jurors may not be able to overcome their "belief in a just world" to evaluate the evidence fairly.

Since California's Proposition 115 changed the California Code of Civil Procedure section 223, shifting jury selection in criminal cases from the province of the attorneys to the province of the court, a prosecutor must depend upon the judge to elicit information on which to remove persons who have extreme cases of "belief in a just world," or who adhere strongly to myths about domestic violence.⁸⁰ Moreover, many judges themselves hold these beliefs,⁸¹ and may therefore be even less likely to screen against them. Even with the rare judge who is aware of the need to elicit information on which to eliminate those jurors, because domestic violence myths are so pervasive and only recently has domestic violence been discussed and addressed in public, it is unlikely that any selected jury would not suffer from some degree of this phenomenon.

76. See Mary I. Coombs, *Telling the Victim's Story*, 2 TEX. J. WOMEN & L. 277, 268, nn.29-30 (1993).

77. See *id.* at 285.

78. See LERMAN, *supra* note 71, at 22.

79. It is a common myth that batterers are financially unsuccessful. Findings have been reported that physicians, service professionals, and police have the highest incidence of domestic violence, and that as a group, batterers may not be distinguishable from any other group of men in their degree of professional capability. See WALKER, *supra* note 45, at 24-25.

80. See Nancy K.D. Lemon, *Domestic Violence: The Law and Criminal Prosecution*, THE FAMILY VIOLENCE PROJECT OF SAN FRANCISCO 141 (2d ed. 1991); see also CAL. CIV. PROC. CODE § 223 (West 1995).

81. See JUDICIAL COUNCIL ADVISORY COMMITTEE, *supra* note 46, § 1, at 5-7.

Ironically, the victim of domestic violence is given less credibility because of her status as a victim. First, jurors may subscribe to any of several domestic violence myths, such as: she likes the abuse, it is her own fault for not leaving, she shouldn't be airing her personal problems in public, etc.⁸² Second, many victims do not make good witnesses. Because victims may be "too" emotional about the crime, or "not emotional enough," jurors may discredit their testimony.⁸³ Victims may give inconsistent or incomplete accounts, depending upon to whom they are speaking and how comfortable they are discussing and disclosing the battering. Many victims are so used to the abuse that they find it difficult to remember specifics.⁸⁴ Jurors may assume a "real" victim would remember the details of her abuse, and may interpret a partial memory as evidence that the victim is lying.⁸⁵ When a victim of domestic violence does take the stand, she may be so fearful to be only a few feet from the defendant that she cannot speak at all.⁸⁶ Finally, jurors may focus on legally irrelevant issues such as the victim's initial choice to be intimate with the defendant or her prior decision to accept abuse. The combination of myths about battered women and the appearance and coherence of the battered woman on the stand create very large obstacles to the successful prosecution of domestic violence cases.

Because most victims of domestic violence are women, prosecutors also face the more general hurdle of gender bias in the courtroom.⁸⁷ In ninety-five percent of heterosexual domestic violence cases, the man is the batterer.⁸⁸ There is a built-in bias against the victim because she is a woman.⁸⁹ The lingering effects of this country's history of sexism include according a woman's testimony less credibility than that granted to a man's testimony.⁹⁰ The woman witness is thought to be less rational and have less accurate testimonial qualities such as memory, perception, and narration. She is also thought to be less trustworthy and more willing to exaggerate.⁹¹ Although we

82. See WALKER, *supra* note 45, at 18-31.

83. See Coombs, *supra* note 76, at 301 ("Patricia Bowman was too irrational, too emotive, too out-of-control; Anita Hill was too cool, too unemotional, too controlled. Neither fit comfortably within the narrow paradigms of the 'True victim.'").

84. See Tamar Lewin, *25% of Assaults Against Women Are by the Men in Their Lives*, N.Y. TIMES, Jan. 17, 1991, at A20.

85. See Coombs, *supra* note 76, at 291 (contrasting trouble that many jurors had with "Patricia Bowman's inability to remember when and why her pantyhose had been removed" with opinion of rape trauma experts that "selective loss of memory is quite normal"). It is the author's opinion, based on numerous conversations with persons both trained and untrained in domestic violence, that people who are untrained in the field of domestic violence often think that any traumatic event such as a violent assault should be remembered in great detail, and that if it is not, it is likely that the assault did not happen.

86. See LERMAN, *supra* note 71, at 23.

87. See JUDICIAL COUNCIL ADVISORY COMMITTEE, *supra* note 46, § 1, at 22.

88. See *supra* note 47.

89. See JUDICIAL COUNCIL ADVISORY COMMITTEE, *supra* note 46, § 6, at 4 (citing Crites, *A Judicial Guide to Understanding Wife Abuse*, THE JUDGES JOURNAL, Summer 1985, at 5).

90. See *id.*

91. See *id.* at 5.

no longer accept such biases as "truth," we cannot entirely rid them from the minds and perceptions of jurors, including, of course, women jurors.

The problems discussed here, which arise both in the preparation of and in the trying of domestic violence cases, are not exhaustive, however. In addition, it is important to understand that all of these problems may be occurring in the same case; they are not mutually exclusive. A battered woman may not be cooperating for several different reasons. There may be no witnesses, and no physical evidence. The jury may be gender biased, prejudiced against victims of domestic violence, and suffer from a "belief in a just world." Because of the combined impact that these factors have on the prosecution of domestic violence cases, prosecutors must look for ways to prepare and present a case creatively so that (1) a victim's testimony is not the only means to a conviction, and (2) the jurors are convinced beyond their prejudices.

Introducing uncharged crimes committed against other victims is one of the best ways to accomplish these goals. First, if the instant victim is unavailable to testify, a prior victim's testimony can corroborate the physical evidence and/or other witness's testimony. In those cases, the prior victim's testimony will help to humanize the unavailable victim. Second, if the instant victim does testify, the prior victim's testimony can corroborate her version. If jurors are employing their "belief in a just world" or domestic violence myths, testimony from a second victim will force them to come up with twice as many rationalizations in order to excuse the batterer. When two victims testify, it is more likely that the jurors will focus on the obvious common element of the two instances, the batterer's behavior, and move away from faulting the victim for her behavior. A prior victim's testimony may also help to overcome an instant victim's weak testimony, her attempt to minimize the violence, or her complete recantation. A prior victim is more likely to be willing to testify, because she is less likely to be in immediate fear of the defendant. She is also less likely to be considering reconciliation. Because her testimony is more freely given, it will be more persuasive to the jury.⁹²

B. *The Current Scheme of Admissibility for Uncharged Bad Acts Under California Evidence Code Section 1101(b)*

If a prosecutor seeks to have an uncharged domestic violence act admitted into evidence, and the uncharged act was committed by the same perpetrator on the same victim, *People v. Zack*⁹³ is controlling. *Zack* held that, "where a defendant is charged with a violent crime and has or had a previous

92. Although a victim can be forced to testify under the threat of contempt, a hostile victim may not be very persuasive to the jury.

93. 229 Cal. Rptr. 317 (Ct. App. 1986). See also *People v. Linkenauger*, 38 Cal. Rptr. 2d 868 (Ct. App. 1995).

relationship with a victim, prior assaults upon the same victim, when offered on disputed issues, e.g. identity, intent, motive, etcetera, [sic] are admissible based solely upon the consideration of identical perpetrator and victim without resort to a 'distinctive modus operandi' analysis of other factors."⁹⁴ However, where a prosecutor seeks to admit uncharged acts of domestic violence committed upon *other* victims (typically ex-girlfriends and ex-wives), there is no specialized evidentiary rule or case law. The rest of this paper will focus on uncharged assaults against *other* victims, since the admissibility of uncharged assaults on the same victim has been largely settled by *Zack*.⁹⁵

Unless the defendant testifies, a prosecutor wishing to admit an uncharged act of domestic violence against another victim in a current case of domestic violence must satisfy the requirements of California Evidence Code section 1101(b).⁹⁶ Under this section, uncharged acts are admissible to prove facts such as intent, plan, and identity.⁹⁷ Evidence admitted under a California Evidence Code section 1101(b) theory may not be used for propensity, or as evidence that the defendant has a disposition to commit this type of crime.⁹⁸ Rather, such evidence reaches the jury only on the theory for which it is admitted. While the language of the rule does not indicate that the above list is exhaustive, in practice it is.⁹⁹ Courts have attempted to define the categories of evidence and limit that which can be admitted under each.

The very complicated, convoluted, and often contradictory case history of California Evidence Code section 1101(b) has come to a head in the recent California supreme court cases, *People v. Ewoldt*¹⁰⁰ and *People v. Balcom*.¹⁰¹ These cases define admissibility under the three most frequently used theories: intent, plan, and identity, in terms of the requisite degree of similarity between the charged and uncharged crime. They also explain when it is appropriate to use each of the above theories.

94. *Zack*, 229 Cal. Rptr. at 320.

95. *See id.*

96. Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act.

CAL. EVID. CODE § 1101(b) (West 1995).

97. *See* § 1101(b).

98. *See* § 1101(b).

99. *See generally* *People v. Thomas*, 573 P.2d 433 (Cal. 1978). *Thomas* demonstrates the struggle over admitting a similar prior charge on a theory not listed in section 1101(b) of the California Evidence Code, and partially disapproves of the admissibility theory used in *People v. Covert*, 57 Cal. Rptr. 220 (Ct. App. 1967), *People v. Kazee*, 121 Cal. Rptr. 221 (Ct. App. 1975), and *People v. Creighton*, 129 Cal. Rptr. 249 (Ct. App. 1976).

100. 867 P.2d 757 (Cal. 1994).

101. 867 P.2d 777 (Cal. 1994).

1. *Intent*

For an uncharged act to be admissible on the theory of intent, the *mental state* of the defendant must be in dispute.¹⁰² That is, the defendant has conceded that the act or part of the act occurred, but denies having the requisite intent.¹⁰³ An uncharged assault will be admitted on an intent theory, if the uncharged crime and the charged crime have a low level of similarity.¹⁰⁴ However, "low" is used only in reference to the degrees of similarity needed for the plan and identity theories. In fact, when intent is at issue, the crimes must be "sufficiently similar to support the inference that the defendant 'probably harbored the same intent in each instance.'" ¹⁰⁵ Because domestic violence crimes are so diverse in their facts, it is less likely that they will be admitted under this theory. For example, it is unlikely that the act of killing a former girlfriend's pet would be sufficiently similar to slapping a current girlfriend, or stalking an ex-wife. Even though they are conceptually similar—violent acts committed upon an intimate partner for the purpose of maintaining power, dominance, and control—they are factually *dissimilar* and therefore likely to be held inadmissible.¹⁰⁶

In a domestic violence case, the intent theory of admissibility would most likely be invoked when the defendant admits that the act or part of the act occurred, but claims that it was either an accident or self-defense.¹⁰⁷ However, there is another hurdle to the proper use of an intent theory of admissibility. If the act as described by the victim is *too* brutal, the court may determine that it is not really the defendant's intent that is at issue at all, but the underlying *act*. For example, in *Balcom*, the prosecutor offered evidence involving the defendant in an uncharged rape on an intent theory for the charged rape. The defendant conceded that he had intercourse with the victim, but denied the rest of the allegations, including his alleged use of a weapon. The Court explained that if the act occurred as described by the victim, the intent of the actor could not be debated. Thus the defendant's state of mind was not disputed, but the charged *act* was.¹⁰⁸ This holding provides an intellectually honest definition of intent, yet leaves the victim of a brutal assault

102. See *Ewoldt*, 867 P.2d at 764 n.2 (citing 2 WIGMORE, EVIDENCE § 300, at 238 (Chadbourn rev. ed. 1979)).

103. See *id.*

104. See *Ewoldt*, 867 P.2d at 770 (citing *People v. Robbins*, 755 P.2d 355 (Cal. 1988)).

105. See *id.*

106. See Telephone Interview with Richard Craft, Deputy City Attorney of the Los Angeles County City Attorney's Domestic Violence Unit (Apr. 5, 1995) (explaining that prior assaults often are not admitted under an *Ewoldt* theory of similarity). Mail Survey from Deputy District Attorney, Donna Wills of the Los Angeles County District Attorney's Domestic Violence Unit (Mar. 14, 1995) (explaining that when their office has attempted to admit prior assaults, they have been denied on ground that incidents are not similar enough).

107. See Mail Survey from Casey Gwinn, Deputy City Attorney of the San Diego City Attorney's Domestic Violence Unit (Feb. 17, 1995) (explaining that prior acts of violence are often admitted on CAL. EVID. CODE § 1101(b) theory, and most often are admitted when defense is "accident" or "self-defense").

108. See *People v. Balcom*, 867 P.2d 777, 781 (Cal. 1994).

in a worse position (unable to admit uncharged assaults on a low degree of similarity) than a victim of a less brutal assault.

2. Plan

For an uncharged bad act to be admissible by claiming to be demonstrative of a similar plan, it must be the *act* that is still undetermined.¹⁰⁹ Thus, if the defendant asserts that he did not commit the act at all, it would be appropriate to use the plan theory of admissibility. Defendants accused of domestic violence often claim that the victim is lying, and thus put the “act” or “plan” at issue.

Acts admitted on a plan theory must meet the intermediate similarity test.¹¹⁰ According to *Ewoldt*, evidence will be admitted if it demonstrates a “concurrence of common features,” so that the “various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations.”¹¹¹ Although this is a lower standard than the court previously required,¹¹² it is nonetheless a stringent standard, especially for domestic violence cases that can appear extremely dissimilar on their facts.¹¹³ It is important to note that a defendant can therefore increase the stringency of the similarity test simply by using the defense that the victim is *lying* rather than using an accident or self-defense theory.

The state of the appellate case law indicates that the plan theory is not being used on a regular basis to admit uncharged acts of domestic violence against other victims in domestic violence prosecutions. If it were being used, it would be reasonable to infer that defendants would be appealing these cases and arguing that the admission of the uncharged act was prejudicial error. In researching this area, I have found only three domestic violence cases in which the defendant has appealed based on the admission of an uncharged act of domestic violence on a plan theory.¹¹⁴ In contrast, there are a plethora of rape and sexual molestation cases decided by the appellate courts and the California Supreme Court that examine the degree of similarities of uncharged acts and rule on their admissibility under the similar plan theory. If the plan

109. See *Ewoldt*, 867 P.2d at 764 n.2 (citing 2 WIGMORE, EVIDENCE §§ 300, 238).

110. See *id.* at 770 (citing 2 WIGMORE §§ 304, 249).

111. *Id.* (emphasis omitted).

112. See *People v. Tassel*, 679 P.2d 1 (Cal. 1984) (holding that prior crime is only admissible under plan theory where charged and uncharged crimes are individual manifestations of single, grand design).

113. When one is familiar with battering patterns and behavior, even the most factually divergent cases may appear strikingly similar in terms of their controlling, terrorizing, and dominating nature.

114. See *People v. Archerd*, 477 P.2d 421 (Cal. 1970); *People v. Bufarale*, 14 Cal. Rptr. 381 (Ct. App. 1961); *People v. Lisenba*, 94 P.2d 569 (Cal. 1939). Notably, the three cases referred to were all homicides, with prior acts of murder or attempted murder. I distinguish these cases from most domestic violence since, unlike most domestic violence cases, here the prior and charged crimes are *factually* similar. In addition, judges may be under more intense pressure during homicide cases, which may in turn affect their evidentiary rulings. In any event, these cases are not representative of typical domestic violence cases. But see *People v. Roehler*, 213 Cal. Rptr. 353 (Ct. App. 1985).

theory were being used in domestic violence cases, these cases would also be appealed, since the sexual molestation and rape cases would serve as excellent authority on which to build an argument. In the absence of such appellate case law, it appears that the plan theory is not being used regularly or effectively for admitting uncharged acts of domestic violence in domestic violence prosecutions.

3. Identity

Finally, an uncharged act may be admitted as evidence on the issue of identity where both the act and state of mind are conceded, but the *identity* of the perpetrator is disputed. Here, the highest degree of similarity must be present.¹¹⁵ *Ewoldt* describes this standard as "sufficiently distinctive so as to support the inference that the same person committed both acts."¹¹⁶ Other courts have required that both incidents bear similar features, as "distinctive as a signature."¹¹⁷ This standard is very stringent. While identity rarely plays a role in domestic violence cases, it can become the issue if the victim recants. For example, the victim may attempt to protect her batterer by claiming that she made a mistake in her first statement, and that it was actually someone *other than* her intimate partner who was responsible for the attack. Although this may not appear to be a plausible defense, when a victim who is the main or only witness in the case recants in this manner, it becomes crucial to the outcome of the case to admit uncharged acts by the defendant on other victims. It is highly unlikely that such uncharged acts will be deemed admissible on an identity theory, since the similarity test is based on the factual similarity of the two acts, rather than the conceptual similarity. As previously noted, in domestic violence cases, it is typically in the conceptual arena rather than the factual, that the similarities between the two incidents will surface.

C. The Barrier of Evidence Code Section 352

For an uncharged act of domestic violence to be admitted into evidence, in addition to being admissible under California Evidence Code § 1101(b), it must also pass California Evidence Code section 352.¹¹⁸ This code section is an additional, yet interrelated, barrier to the California Evidence Code section 1101(b) scheme of admissibility. California Evidence Code section 352 creates a balancing test. To pass the test, the uncharged act must be determined

115. See *Ewoldt*, 867 P.2d at 770.

116. *Id.* (citing *People v. Miller*, 790 P.2d 1289 (Cal. 1990)).

117. *Id.* (citing 1 MCCORMICK ON EVIDENCE § 190 at 801-03 (4th ed. 1992)).

118. "The court in its discretion may exclude evidence if its probative value is outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." CAL. EVID. CODE § 352 (West 1995).

to have a degree of probative value that is not substantially outweighed by its prejudicial nature.¹¹⁹

To apply the California Evidence Code section 352 balancing test, a judge must classify the possible inferences from the evidence as either probative or prejudicial. If a particular inference harms the defendant's case, it is not necessarily prejudicial. However, if the evidence could be used by a juror to make an impermissible inference, such as the character inference, it will be classified as prejudicial. If a particular inference supports an element of the crime, it is probative of that issue. However, its degree of probative value may depend upon whether or not the defendant has put that particular element at issue. Thus, even though *People v. Rodriguez*¹²⁰ and *People v. Daniels*¹²¹ have held that a defendant's plea of not guilty *does* put all of the elements of a crime in issue for the purpose of deciding admissibility under California Evidence Code section 1101(b), unless the defendant, by way of his defense, has put that element at issue, its probative value may not be very high. Since most uncharged act evidence could be used for the impermissible character inference, it is easily and frequently excluded under California Evidence Code section 352.¹²²

Finally, by using this sequence to determine uncharged act admissibility, a defendant is able to craft his defense in a manner which makes it even more difficult to have uncharged act evidence admitted. For example, by avoiding an intent theory, which only requires a low level of similarity, and instead putting at issue plan or identity, the defendant can simultaneously increase the stringency of the similarity test for the uncharged act under California Evidence Code section 1101(b) and decrease the probative value of an intent inference, thereby making exclusion under California Evidence Code section 352 much more likely. This scheme greatly decreases the prosecution's ability to have uncharged domestic violence assaults admitted at all since it is difficult to meet even the lowest degree of similarity in these cases.

D. Problems with the Current Scheme

The current scheme is extremely problematic for the admissibility of uncharged acts of domestic violence. First, acts of domestic violence are seemingly dissimilar on their facts and yet extremely similar in their concept: dominating, terrorizing, and controlling an intimate partner or ex-partner.¹²³

119. *See id.*

120. 726 P.2d 113, 126-27 (Cal. 1986).

121. 802 P.2d 906, 925 (Cal. 1991).

122. *See* Telephone Interview with Susan Breall, District Attorney, San Francisco District Attorney's Domestic Violence Unit (Mar. 26, 1995) (explaining that prior assaults are rarely admitted and are usually excluded under CAL. EVID. CODE § 352); *see also* Gwinn, *supra* note 107 (explaining that judges generally base refusal to allow admission of prior charge upon remoteness or California Evidence Code § 352).

123. It should be noted that some batterers may use a particular method of abuse predominately, such as choking, kicking, or punching in the head (a method which is safer for the batterer, since it does not

Second, theories not listed in California Evidence Code section 1101(b) are rarely recognized. For example, corroborating the victim's testimony is a purpose considered invalid in its own right. It is considered an acceptable theory for the jury to consider only if the uncharged act is also admitted on one of the standard theories.¹²⁴ Third, even though a plea of not guilty is held to put all of the elements of the crime at issue, since all uncharged acts must pass the California Evidence Code section 352 balancing test (the uncharged act may not come in if its prejudicial nature substantially outweighs its probative value),¹²⁵ it is rare that an uncharged act can be admitted before the defendant offers a specific defense. Thus, the defendant may be able to craft a defense in which it is less likely that his other acts of domestic violence will be admissible at all, and thereby rest on a false aura of peacefulness with his intimate partners. Finally, it is clear from the absence of domestic violence cases in the published arena that the above scheme is problematic. Although it is possible that such uncharged bad acts toward other victims are being admitted under the above theories and that the cases are resulting in convictions, it is unlikely that such defendants would not be appealing their cases in the hopes of having their convictions overturned, as many rape and child molestation defendants have been doing so successfully.¹²⁶

Having carefully examined both the difficulties of prosecuting domestic violence and the current problems with the scheme of admissibility for uncharged acts of domestic violence, I will now turn to solutions. The next section of this article will explain the approach taken to address similar problems in the area of sexual assault at the federal level. I will discuss the recent changes in the law and the debate surrounding these changes. Finally, I will use the sexual assault approach as a model for creating a solution in the area of domestic violence prosecutions.

leave visible bruises).

124. See *People v. Thomas* 753 P.2d 433 (Cal. 1978).

125. See CAL. EVID. CODE § 352 (West 1995).

126. See *Thomas*, 573 P.2d at 433 (overruled in part); *People v. Alcala*, 205 Cal. Rptr. 775 (Cal. Ct. App. 1984); *People v. St. Andrew*, 161 Cal. Rptr. 634 (Cal. Ct. App. 1980).

II. THE APPROACH OF FEDERAL RULES OF EVIDENCE 413-414

A. Introduction

In the recent Victim's Violent Crime Control and Law Enforcement Act, signed by President Clinton in 1994, three new Federal Rules of Evidence were enacted.¹²⁷ These rules deal with the admissibility of similar uncharged acts in both criminal and civil cases. Federal Rule of Evidence 413, dealing with criminal prosecutions for sexual assault, sets out the test for admissibility in its part (a), which reads, "In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant."¹²⁸ Federal Rule of Evidence 414, dealing with criminal prosecution of child molestation, sets out the test for admissibility in its part (a) which reads, "In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant's commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant."¹²⁹

These rules are groundbreaking in their direct approval of admitting uncharged acts for the explicit purpose of propensity and disposition. Federal Rule of Evidence 404(b) clearly states that "[E]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith."¹³⁰ Such evidence may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.¹³¹ Until now, uncharged bad acts have never been admitted under the Federal Rules of Evidence on an explicit theory of propensity. In fact, judges usually give clear limiting instructions to juries when an uncharged bad act has been admitted.¹³² These limiting instructions are meant to clarify to a jury that they may use the uncharged offense only on the theory for which it was admitted (typically intent, plan, or identity).¹³³ They also clarify that the jury

127. See *supra* note 42; see also CONG. REC. H8991-92, Aug. 21, 1994, *Floor Statement of the Principal House Sponsor, Representative Susan Molinari, Concerning the Prior Crimes Evidence Rules for Sexual Assault and Child Molestation Cases*; David J. Karp, *Evidence of Propensity and Probability in Sex Offense Cases and Other Cases*, 70 CHICAGO-KENT L. REV. 15 (1994) (article by author of FED. R. EVID. 413-415 providing background on Rules); Daniel E. Lundgren, *Stopping Rapists and Child Molesters by Giving Juries All the Facts—Reforms in Federal and California Law*, PROSECUTOR'S BRIEF, No. 2, 1995, at 13; *Legislative Intent of AB 882*, ASSEMBLY JOURNAL, Aug. 28, 1995 (giving background on CAL. EVID. CODE § 1108).

128. FED. R. EVID. 413(a).

129. FED. R. EVID. 414(a). Because Rule 415 deals with admissibility in civil cases, I will not be discussing it in this article.

130. FED. R. EVID. 404(b).

131. See *id.*

132. See *Evidence of Other Crimes*, CALJIC 2.50 (5th rev. ed. & Supp. 1995).

133. See *id.*

may *not* use the uncharged bad acts generally to assess the defendant's character or his propensity to commit this type of crime.¹³⁴ Although it is debatable whether or not juries comply with such instructions, as well as whether they are *capable* of doing so, these arguments have generally been used as reasons to keep the uncharged acts out completely, rather than as reasons for adopting a propensity-based admissibility rule.¹³⁵

Though the new rules do not directly change the balancing test of Federal Rule of Evidence 404(b)—the federal counterpart to California Evidence Code section 352, discussed above—they do directly affect the operation of the balancing test. Prior to the enactment of these rules, any reference to the defendant's bad character was deemed "prejudicial" and oftentimes led to the exclusion of that evidence. Under the new rules, although the balance test is still in place, the character inference as to the defendant's disposition to commit acts of child molestation or sexual assault is considered "probative" and will enhance the likelihood of admissibility. Only if the evidence was deemed too prejudicial on other grounds would it be excluded under Federal Rule of Evidence 404(b).

The new rules are also groundbreaking in that they were passed by Congress rather than by the Judicial Conference of the United States. On February 9, 1995, the Judicial Conference made recommendations to Congress regarding these new rules.¹³⁶ However, Congress was not obligated to respond.¹³⁷ With no response from Congress, the rules became law on July 9, 1995.¹³⁸ Congress has supported these new rules with a common-sense analysis. Congresspeople were outraged that the Federal Rules of Evidence were being used to keep juries from finding out about the extremely probative evidence of uncharged rapes unless the crimes were extremely similar on their facts.¹³⁹ One of the cases they considered concerned the molestation of a girl by her father, where although the older sister was willing and brave enough to testify to her own, uncharged molestation by the defendant, the appellate court reversed the conviction, holding that the admission of the uncharged act was prejudicial error.¹⁴⁰ Congress's action is a demand that we look at problems of rape and sexual molestation from a real world perspective rather than from the ivory tower of academia or judicial chambers.

Since these rules were proposed, their necessity and projected impact have been the subject of heated debate. These rules are supported by the following

134. *See id.*

135. *See, e.g.,* David P. Bryden & Roger C. Park, *Other Crimes Evidence in Sex Offense Cases*, 78 MINN. L. REV. 529, 537 n.20 (1994); Daniel J. Buzzetta, *Balancing The Scales: Limiting the Prejudicial Effect of Evidence Rule 404(b) Through Stipulation*, 21 FORDHAM URB. L.J. 389, 391 n.12 (1994).

136. *See* 3 U.S.C.A. § 973 (West 1995).

137. *See id.*; Junda Woo, *Judges Attack Legislation That Eases Rape Evidence*, WALL ST. J., Sept. 22, 1994, at B8.

138. *See* FED R. EVID. 414-415.

139. *See* 137 CONG. REC. E3503 (daily ed. Oct. 22, 1991) (statement of Rep. Molinari).

140. *See id.* (citing *People v. McMillan*, 502 N.E.2d 1263 (Ill. App. Ct. 1980)).

theories: (1) they are needed to deal with the typical swearing matches that occur between victims and defendants in rape and sexual molestation cases; (2) they help address the inflexibility of our current system of admissibility; (3) they are useful based on the doctrine of chances; and (4) it is true that a person who commits one act of rape or sexual molestation is likely to be the kind of person who would do it again. The four main arguments against these rules are: (1) they are not needed; (2) the current system provides an important balance which would be destroyed with the adoption of these rules; (3) the rules are unfair to defendants; and (4) they waste time and money. I will now give a brief description of these arguments in order to evaluate the usefulness and appropriateness of applying a similar rule of admissibility to domestic violence cases in California.

B. The Proponents' Arguments in Favor of Federal Rules of Evidence 413-414

Proponents of these rules argue that they are necessary for several reasons. First, because there are rarely any witnesses to rape and sexual molestations, prosecutions often become a swearing match between the victim and the defendant.¹⁴¹ Even in the less common rape cases where physical evidence of intercourse is recovered, the defendant will usually use the defense that the victim consented, thereby turning the case back to his word against the victim's. In such cases, the fact finder ends up unfairly fixating upon the credibility of the victim.

Uncharged sex crimes can help to resolve these swearing matches because they provide corroboration for the victim's testimony. Although the degree of corroboration will depend on how independent the source of the uncharged crime is from the source of the instant offense, under the new rules, the jury will still have at least some evidence other than the victim's credibility on which to evaluate the charge. This swearing match does not occur on an even playing field. A victim's ability to testify "well," her gender, and her status as a victim all favor the male defendant.

First, because a victim will be reliving a traumatic event, her testimony may contain inconsistencies.¹⁴² She may be unable to verbalize the entirety of the attack. The victim may also be "too" emotional or "not emotional enough" for the jurors' tastes.¹⁴³ In contrast, the defendant, though he may or may not testify, will no doubt have worked out a neatly consistent story which can be unfolded to the jury in a strong yet sympathetic manner.¹⁴⁴

141. See Karp, *supra* note 127, at 21.

142. See Coombs, *supra* note 76, at 290.

143. See Bryden & Park, *supra* note 135, at 577; Coombs, *supra* note 76.

144. It should not be surprising that many men who rape, sexually assault, and batter may make excellent witnesses. It is often because of their charismatic appeal and their ability to manipulate and lie that they gain access to their victims. Batterers are especially adept at this since they have *ongoing* relationships with their victims, where they must continually manipulate and appeal to their victim to continue the relationship.

Second, because the victim is often female and the defendant often male, victims of rape and sexual molestation often face gender bias in the courtroom.¹⁴⁵ Testimony of females has traditionally been considered suspect,¹⁴⁶ and without further evidence or testimony, may not be ultimately relied upon by a jury. Third, because of the prejudice, stigma, and suspicion that attaches to the victim of a sex crime, the jury may be unwilling to accept the testimony of the victim for the ironic reason that she is in fact, or at least purports to be, a victim of a sex crime.¹⁴⁷ Thus, because sex crimes are part of a larger system of societal oppression of women and because the difficulties in prosecution are compounded by gender bias and victim stigma, we must take steps to overcome these biases, and admitting similar uncharged bad acts is one of the most feasible and reasonable approaches.¹⁴⁸ Proponents of the new rules also suggest that they are necessary because the current laws on the admissibility of uncharged bad acts may not be intellectually honest, and may result in unfair outcomes. First, the current rules require giving jurors limiting instructions, though there is empirical evidence that shows that jurors have difficulty fully understanding and abiding by those instructions.¹⁴⁹ Second, the Federal Rule of Evidence 404(b) theories under which an uncharged bad act may be admitted have often masked a disposition theory.¹⁵⁰ That is, the hair-splitting analysis of deciding whether an uncharged bad act helps to establish the defendant's intent to commit the crime, or his disposition to do so, may be nothing more than semantic. Third, the task of applying the 404(b) exceptions to the character rule is a difficult one that may result in disparate outcomes for defendants. This disparity arises in part because it is difficult, if not impossible, for judges to be consistent with each other's rulings in identifying the exact level of similarity between the instant offenses and the uncharged bad acts. This is evident from the frequent overturning of trial court decisions by appellate courts who have determined that the crimes did not meet the similarity threshold, whatever its level of stringency.¹⁵¹

The proponents draw upon the following common-sense, anti-coincidence argument to support the new rules. In rape cases, it is always possible that the victim had *consensual* sex with the defendant and then claimed rape. It is also

145. See JUDICIAL COUNCIL ADVISORY COMMITTEE, *supra* note 46 *passim*.

146. See *id.*

147. These stigmas and stereotypes include: she's a liar, she's loose, she led him on, she's ruined, she's spoiled goods, she's a slut, she just regrets having sex, etc. See Coombs, *supra* note 76, at 283-84; see also DIANA RUSSELL, *POLITICS OF RAPE* *passim* (1975); ROBIN WARSHAW, *I NEVER CALLED IT RAPE* 75-79 (1988).

148. See Bryden & Park, *supra* note 135, at 583.

149. See *id.* at 537 n.20.

150. See *id.* at 557 n.123.

151. Although we do not see such cases in the appellate courts, there are likely cases where the trial court kept the prior bad act out, but the appellate court would have found it admissible if given the opportunity. In other words, I do not believe that this is simply a problem of the appellate courts being stricter than the trial courts. The trial court judges are likely doing their best to apply the tests in the same manner as the appellate court would, for they know that if they do not, they leave themselves open to a reversal on prejudicial error.

possible that the victim identified the wrong person in the lineup. Finally, based on some ulterior motive, the woman may have fabricated the rape claim. Similarly, in child molestation cases, it is always possible that the child misunderstood the touchings, that the child misidentified the abuser, or that the child completely made up the touchings based on some other motive. If, however, there is evidence of a prior similar offense on a *different* victim, all of the above scenarios become far more improbable. It is highly unlikely that any one unfortunate defendant who might be the "victim" of any of the above scenarios would be so unlucky as to have two of his ex-partners make up such a story, or to have two children he has known misunderstand his touchings.¹⁵² It also would be an incredible coincidence if a defendant who had been a chronic rapist or child molester were falsely or mistakenly implicated in a later crime of the same type.¹⁵³ "In conjunction with the direct evidence of guilt, knowledge of the defendant's past behavior may foreclose reasonable doubt as to guilt in a case that would otherwise be inconclusive."¹⁵⁴

Finally, proponents of these rules argue that the propensity theory, though unacceptable in the ivory tower, makes sense and is important to a jury's analysis of a rape or sexual molestation prosecution. Since a person who commits acts such as rape or child molestation has a particular combination of aggressive and sexual impulses and a remarkable lack of inhibitions that allows him to commit such crimes,¹⁵⁵ it is both especially relevant and probative that a defendant has committed these acts previously. Evidence of past sex crimes leads to the common sense inference that it is more likely that the defendant was capable of committing the instant crime. The proponents argue that since it takes such a particular set of character traits to commit these acts, the value of the propensity inference is greater than in most cases.¹⁵⁶

C. *The Critics' Arguments Against Federal Rules of Evidence 413-414*

Although these rules have already been enacted, some critics still predict that they will cause injustice. First, the critics say the rules are unnecessary. They claim that society is no longer infected with ailments such as gender bias, and that crimes like child molestation, although heinous, are no longer thought improbable.¹⁵⁷ According to the critics, since the prosecution of rape and molestation no longer fits within a larger social context of the oppression of women and children, special admissibility rules in trials for these crimes are

152. Even where the defendant is a stranger to the victim, such scenarios are unlikely.

153. See Karp, *supra* note 127, at 20.

154. *Id.*

155. See *id.*

156. See *id.*

157. See Bryden & Park, *supra* note 135, at 558 (citing Lannan v. State, 600 N.E.2d 1334, 1335-37 (Ind. 1992)).

unwarranted.¹⁵⁸ In addition, critics note that if any crimes deserve a special admissibility rule, it is those crimes with the highest recidivism rate,¹⁵⁹ because a high recidivism rate is likely to increase the accuracy of a propensity inference. Since crimes such as drug use have higher recorded recidivism rates than rape or sexual molestation,¹⁶⁰ these cases should be prioritized above sex crimes, if any specialized admissibility rules are to be put in place.¹⁶¹

Next, the critics argue that the new rules upset the critical balance inherent in Federal Rules of Evidence 404(a) and 404(b). The previous scheme keeps out uncharged bad acts on propensity theories, but admits them on theories such as intent, plan, and identity. They argue that courts have already become increasingly liberal on admissibility and that the new Federal Rules of Evidence 413-414 abolish the defendant's last remnants of protection from impermissible character inferences.¹⁶² They claim that the new rules are unfair because when jurors are allowed to evaluate a defendant's uncharged bad acts on a propensity theory, they are more likely to convict him on a "bad guy theory"¹⁶³ and fail to consider whether he actually committed the crime for which he is on trial.¹⁶⁴ That is, the jurors may simply decide that they want this "bad guy" punished and off the streets. Similarly, some suggest that the jurors will take their decision less seriously since, if they convicted the defendant erroneously, they could take comfort in knowing that he was not a wholly innocent and law-abiding person anyway.¹⁶⁵ Finally, the critics say that the new rules destroy the intended balance of the current rules by allowing into evidence remote and uncharged crimes on the very low standard of proof¹⁶⁶ of Federal Rule of Evidence 104(b).¹⁶⁷

The critics point out that enactment of the new rules may trigger the phenomenon of "rounding up the usual criminals."¹⁶⁸ They explain that, once a person has been convicted of or even accused of committing a sex crime,

158. *See id.*

159. *Cf.* Edward J. Imwinkelried, *Undertaking the Task of Reforming the American Character Evidence Prohibition: The Importance of Getting the Experiment Off on the Right Foot*, 22 FORDHAM URB. L.J. 285, 303-04 (1995).

160. *See* Bryden & Park, *supra* note 135, at 572-73.

161. *Cf.* Imwinkelried, *supra* note 159.

162. *See* AMERICAN BAR ASSOCIATION CRIMINAL JUSTICE SECTION REPORT TO THE HOUSE OF DELEGATES, 22 FORDHAM URB. L.J. 343, 348-49 (1995) [hereinafter ABA CRIMINAL JUSTICE SECTION].

163. Buzzetta, *supra* note 135, at 391 n.12 (explaining that "while consciously deciding whether to infer the accused's subjective bad character from the accused's prior bad acts, at a subconscious level the jurors may be tempted to punish the accused for the other crimes") (citing John T. Johnson, *The Admissibility of Extraneous Offenses in Texas Criminal Cases*, 14 S. TEX. L.J. 69 (1973)).

164. *See id.*; ABA CRIMINAL JUSTICE SECTION, *supra* note 162.

165. *See* ABA CRIMINAL JUSTICE SECTION, *supra* note 162.

166. *See* Norman M. Garland, *Some Thoughts on the Sexual Misconduct Amendments to the Federal Rules of Evidence*, 22 FORDHAM URB. L.J. 355, 357-58 (1995); Letter from David P. Leonard, Professor of Law and William M. Rains Fellow, Loyola Law School, and Chair, Section on Evidence, Association of American Law Schools, at 3 (Oct. 12, 1994) (on file with author).

167. *See* FED. R. EVID. 104(b) ("When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.").

168. *See* Bryden & Park, *supra* note 135, at 575-76.

the police will have his photograph and information on file.¹⁶⁹ When trying to identify the perpetrators of other rapes and child molestations, the police will likely show victims the photos of persons previously convicted or accused.¹⁷⁰ Thus, they argue that the anti-coincidence theory is invalid and that multiple criminal implications occur because of suggestive line-ups.¹⁷¹

Finally, the critics argue that the new rules will waste the court's time and money.¹⁷² Because the defendant must have the opportunity to defend himself against any uncharged priors, there will likely be "mini-trials" within every trial.¹⁷³ Depending upon how many uncharged bad acts a prosecutor seeks to admit, each trial could take significantly longer.¹⁷⁴ It may also be believed that jurors will become confused enough to lose track of the actual issues and elements of the instant crime if there are numerous "mini-trials" on uncharged acts occurring within the main trial.

Although not exhaustive, the above arguments cover most of the substantive challenges to the new rules. In addition, the critics claim that there are linguistic ambiguities within the new federal law. I will not address these arguments here, however, since the rule I am proposing is drafted somewhat differently.

III. APPLYING THE APPROACH OF FEDERAL RULES OF EVIDENCE 413-414 TO DOMESTIC VIOLENCE PROSECUTIONS

The Federal Rules of Evidence 413-414 have already sparked state legislation to the same effect. On January 1, 1996, California enacted similar legislation codified in California Evidence Code section 1108. This legislation is a progressive and necessary step in the prosecution of rape and sexual molestation. A similar approach would be fair, necessary, and useful in the prosecution of domestic violence. I am proposing a California statute for the admissibility of uncharged crimes of domestic violence, committed against other victims, in domestic violence prosecutions. I focus here only on California; however, these arguments are equally applicable to many other states, and I urge others to take action to bring about this critical change throughout the United States. It is time to bridge the gap between following the rules of evidence and doing justice.

169. *See id.*

170. *See id.*

171. *See id.*

172. *See id.* at 565.

173. *See id.*

174. *See id.*

A. Propensity

California's present admissibility rules prohibit jurors from evaluating an uncharged bad act on a propensity theory. That is, the jurors may not infer that a defendant who has committed a similar uncharged bad act possesses a certain character and is therefore predisposed to commit that type of crime. The defendant's imputed character flaws may not be used at trial to imply action in conformity therewith. The propensity inference is barred not because it is irrelevant, but because it is too prejudicial. That is, our justice system holds that defendants can be convicted only for committing the particular act for which they were charged, not for their general character. That said, the propensity argument is a common-sense, reasonable argument— an argument that is particularly relevant in the area of domestic violence, and is necessary given the special biases which unfairly affect domestic violence prosecutions.

Common sense suggests that a person with a history of beating his intimate partner stands on different ground than does a person without that history.¹⁷⁵ Although it is very difficult to collect accurate recidivism statistics in the area of domestic violence due to victims' tendency to under-report, much work has been done studying and evaluating batterers' profiles. An expert in the field explains that episodes of violence are not "expressive" but are "instrumental."¹⁷⁶ This means that the violent episodes are not simply unconnected episodes of rage, loss of control, or an inability to manage anger (as batterers would like us to believe), but rather that the violence is a calculated, purposeful way to control the life of an intimate partner.¹⁷⁷ The propensity inference is appropriate precisely because of this "system of control."¹⁷⁸ Additionally, studies have shown that once a person has established a pattern of beating an intimate partner, he is likely to continue the abuse "unless there is some intervention, such as criminal justice sanctions and/or treatment."¹⁷⁹

Because any one battering episode is likely to be but a small part of a larger scheme of dominance and control, domestic violence usually escalates in frequency and severity.¹⁸⁰ This escalation pattern renders the propensity theory particularly appropriate for domestic violence crimes. Denying jurors the right to draw the propensity inference perpetuates the myth that violent

175. Cf. Karp, *supra* note 127, at 20 (making same argument with regard to child molesters).

176. See Donna K. Coker, *Heat of Passion and Wife Killing: Men Who Batter/Men Who Kill*, 2 S. CAL. REV. L. & WOMEN'S STUD. 71, 85 n.53 (1992).

177. "[Battering] is a cohesive pattern of coercive controls that include verbal abuse, threats, psychological manipulation, sexual coercion, and control over economic resources." *Id.* at 85, n.55 (citing David Adams, *Identifying the Assaultive Husband in Court: You Be the Judge, Response to Victimization of Women & Children*, 13-14 (1990)).

178. *Id.* at 85.

179. *Id.* at 84 n.52 (citing Daniel Jay Sonkin & William Fazio, *Domestic Violence Expert Testimony in the Prosecution of Male Batterers*, in DOMESTIC VIOLENCE ON TRIAL: PSYCHOLOGICAL AND LEGAL DIMENSIONS OF FAMILY VIOLENCE 218, 222-23 (Daniel Jay Sonkin ed., 1987)).

180. See *id.*; see also Mahoney, *supra* note 52, at 6 (defining and naming separation assault).

episodes committed by one intimate partner against the other are isolated events, slips, or outbursts. Failure to dispel this myth weakens our ability to protect future prospective victims. Although it is crucial that our justice system protect the rights of the defendant, if we fail to address the very nature of domestic violence we will continue to see cases where a man beats his intimate partner, even kills her, and goes on to beat or kill his next intimate partner. Since criminal prosecution is one of the few processes that can interrupt the escalation pattern so common in domestic violence,¹⁸¹ we must be willing to look at patterned behavior during the criminal prosecution or we will miss our opportunity to address the problem at all.

In addition to voicing the traditional stand against propensity evidence in general, the critics of the Federal Rules of Evidence 413-414 use recidivism rates to oppose the use of propensity for specific types of crimes. For example, one pair of commentators suggests that the "available data on recidivism do not support a unique rule for sex crimes."¹⁸² Although they acknowledge that rape is under-reported, they point out that many other crimes are under-reported as well, especially "victimless" crimes such as drug use.¹⁸³ Thus, the critics are likely to be unimpressed with under-reporting of domestic violence as a justification for admitting uncharged acts.

Contrary to the critics' notions about recidivism in crimes of domestic violence, however, some studies show that, even with under-reporting, domestic violence has a high rate of recidivism.¹⁸⁴ The Bureau of Justice Statistics study of 1991 found that "about one in five women victimized by a husband or former husband reported that they had been the victim of a *series* of similar crimes, with at least three assaults in the last six months, so similar that they could not remember them distinctly."¹⁸⁵ It has also been found that there is a fifty-seven to eighty-six percent likelihood of a batterer abusing a new intimate partner.¹⁸⁶ Finally, at least one study indicates that, although police statistics show repeat incidents of domestic violence to be infrequent, interviews with abused women show that "repeat incidents are the *rule* rather than the exception."¹⁸⁷

Additionally, these recidivism statistics reflect only a minor percentage of criminal episodes of domestic violence, because only a small portion of criminalized domestic violence is ever documented. Truly accurate statistics on the recidivism of domestic violence would include every incident of

181. See Coker, *supra* note 176, at 84 n.52.

182. Bryden & Park, *supra* note 135, at 572-73.

183. See *id.*

184. See Mahoney, *supra* note 52, at 11 n.43 (citing DIANA E. RUSSELL, RAPE IN MARRIAGE 96-101 (1982) (reviewing statistical techniques and results of several surveys on domestic violence)).

185. Lewin, *supra* note 84 (emphasis added).

186. See Coker, *supra* note 176, at 84 n.52 (citing Daniel G. Saunders, *Child Custody Decisions in Families Experiencing Woman Abuse*, 39 Soc. WORK 51, 53 (1993)).

187. NATIONAL CLEARINGHOUSE FOR THE DEFENSE OF BATTERED WOMEN, *supra* note 52 (citation omitted).

stalking, every threat of violence, every slap, every push, every unwanted touching, every harassing telephone call, every restraining order violation, and on and on. Domestic violence is pervasive. We cannot record only those episodes that escalate to criminal sanctions or even to physical violence and then pretend that our statistics on domestic violence recidivism are accurate. If we included all types of domestic violence in our recidivism statistics, it is likely that the recidivism rates would far surpass the recidivism rates for many crimes.

Finally, neither the proponents of the Federal Rules of Evidence 413-414 nor I take the position that the only justification for using a propensity inference is a high recidivism rate. The proponents of the Federal Rules of Evidence 413-414 put forth many strong arguments to support their proposed rule, only one of which was propensity. Even within the propensity argument, the proponents cite reasons other than recidivism. For example, they point to the unusual combination of aggressive and sexual impulses motivating the commission of sex crimes and the lack of effective inhibitions against such impulses.¹⁸⁸ Similarly, it is my position that the high recidivism rate of domestic violence, coupled with the systematic, continual, escalatory nature of domestic violence, all occurring within the contours of a sexist criminal justice system, makes domestic violence an excellent candidate for a categorical exception to the general prohibition on the admissibility of propensity evidence.

B. The Anti-Coincidence Argument

As discussed previously, many domestic violence cases turn on an evaluation of the defendant's word against the victim's. The anti-coincidence argument, which is used in rape and sexual molestation cases, could help illuminate this otherwise murky debate, since the argument essentially works the same way in the domestic violence context as well. In fact, I will show that it is even more illuminating in domestic violence cases because in these cases the major critique of the anti-coincidence argument is rendered moot.¹⁸⁹

The anti-coincidence argument is another common-sense argument that helps to reduce the effect of domestic violence myths. It takes one of two forms. First, it is simply unlikely that any one man would twice be the victim of false accusations of domestic violence. For example, it is possible that a man would be unfortunate enough to have an intimate partner who falsely accuses him of domestic violence because she is man-spirited, mentally ill, or jealous. And it is possible, albeit unlikely, that this woman would be determined enough to pursue the case through the judicial system, and cunning enough to fool police and/or deputies in the district attorney's office. As

188. See Karp, *supra* note 127, at 20.

189. Cf. Bryden & Park, *supra* note 135, at 577 (making similar argument for acquaintance rapes).

unlikely as such a fact pattern is, however, it is next to unthinkable that a person would suffer such misfortune *twice*—so unthinkable, in fact, that the uncharged act of domestic violence supports the much more reasonable inference that these accusations, rather than being fabricated by the purported victim, flow directly from the defendant's actions.

The anti-coincidence argument also stands for the idea that it is highly unlikely that a man falsely accused of domestic violence would be a man with an actual history of domestic violence. Only a small percentage of domestic violence is documented through police reports, medical records, or convictions. Even if documentation exists to show that a man is an actual abuser, it would be highly coincidental for this man also to be *falsely* accused of domestic violence by a subsequent intimate partner. Because it is so unlikely that someone would happen to be falsely accused of a crime for which he already has a history, a documented uncharged act of domestic violence on another partner is highly probative of the truthfulness of the instant domestic violence charge.

It may be argued that the anti-coincidence theory cannot actually work until there are several strikingly similar prior offenses. However, jurors will only assign the amount of "anti-coincidence" effect that they deem appropriate based on the number and similarity of the incidents. Because the anti-coincidence theory rests on common sense, jurors will use their common sense to infer that it is more likely that someone is guilty of an instant charge of domestic violence if he has a history of such crimes than if he has none. Finally, it should be noted that, since domestic violence is so under-reported,¹⁹⁰ even one prior act of domestic violence, charged or uncharged, is quite probative of a defendant's guilt.

Critics have argued that the anti-coincidence theory is invalid within the rape context, contending that the above illustration of "highly coincidental" is just the opposite. That is, it is actually very likely that someone who was accused or convicted of rape in the past will be falsely accused of rape in the future.¹⁹¹ They paint the scene of a rape victim being taken down to the police station to look at a line-up or booking photos.¹⁹² They describe officers who subtly or not so subtly encourage the victim to identify one of the previously convicted defendants, perhaps even a particular defendant.¹⁹³

This is known as the problem of "rounding up the usual criminals."¹⁹⁴ Other commentators have explained, however, that if this scenario occurs at all, it is only possible in the most unusual rape cases: stranger rapes.¹⁹⁵ Because the vast majority of rapes are committed by an acquaintance of the

190. See generally WALKER, *supra* note 45.

191. See Leonard, *supra* note 166, at 2; Bryden & Park, *supra* note 135, at 575-76.

192. See Bryden & Park, *supra* note 135, at 575-76.

193. See *id.*

194. *Id.*

195. See *id.* at 577.

victim, identity is rarely at issue. Likewise in domestic violence the victim, by definition, knows the defendant and could not be persuaded to identify the wrong man. Therefore, the "rounding up the usual criminals" argument, even if valid, really only applies to stranger rape cases. Thus, the main critique of the anti-coincidence theory is rendered moot in cases of acquaintance rape and in cases of domestic violence, including marital rape.

The critics of the anti-coincidence theory also argue that uncharged bad acts of sexual assault and child molestation should not be admissible unless they are "wholly independent," an element not required elsewhere in the law.¹⁹⁶ This critique is inaccurate and offensive. The critique is offensive because it rests either on the assumption that women conspire, manipulate, and lie about abuse, or on the assumption that they can be so easily swayed by another woman's story that they might imagine non-existent violence. I am not arguing that women never lie, but to base an admissibility rule on the assumption that women lie is basing the rule on the bizarre exception rather than the multitude of "mundane," typical domestic violence cases and victims.¹⁹⁷ Rather than acknowledging the probative value of most uncharged episodes of abuse, the critics would prefer to assume that the evidence is tainted and paternalistically determine that the jury is incapable of distinguishing tainted testimony from untainted.

C. Time and Efficiency Concerns

The critics of the approach in the Federal Rules of Evidence 413-414 cite time and efficiency as reasons to oppose the new rules¹⁹⁸ and are likely to have the same concerns about the proposed California rule. However, these fears can be easily allayed. First, critics cite the problem of "mini-trials" that may arise when an uncharged act is admitted.¹⁹⁹ Because the standard of proof for admissibility is merely "sufficient to support a finding," they argue that each admitted uncharged act will result in a trial within a trial.²⁰⁰ This will become time consuming, and will put the defendant in the position of defending against his entire past, rather than against the crime for which he is charged.²⁰¹ Critics further suggest that admitting uncharged acts will only confuse the jury about the actual issues of the main trial.

Defendants will likely argue that they did not commit the uncharged bad acts. This, of course, is their right, and they should be given adequate time to respond to any offer of proof by the prosecution. However, it is unlikely

196. *See id.* at 574.

197. In fact, when victims of domestic violence victims do lie on the stand, it is usually to minimize the violence and protect the batterer.

198. *See* Bryden & Park, *supra* note 135, at 565; Leonard, *supra* note 166, at 1.

199. *See* Bryden & Park, *supra* note 135, at 565.

200. *See id.*

201. *See id.*

that such responses will escalate to the point of wasting time. It is only uncharged acts of *domestic violence* which will be admitted under my proposed rule, not any crime the defendant has ever committed. In addition, there will need to be evidence of that abuse; for example, a witness who is willing to testify to uncharged abuse or some documentation that overcomes hearsay issues. Because of the low reporting rate for domestic violence crimes, the low cooperation rate of domestic violence victims, and the often inadequate documentation by the police and medical personnel, it is highly unlikely that any one defendant will have many uncharged acts to defend against, even if he has committed numerous acts of domestic violence throughout his life. Finally, even if a particular defendant had beaten several of his partners, all of his partners had reported the abuse, all were willing to testify, and the prosecutor attempted to admit all of these uncharged offenses, the judge could use California Evidence Code section 352(a) to keep out all but the most important uncharged acts. This proposed rule simply seeks to admit uncharged domestic violence in those cases where there is a former victim who can testify or documented evidence of an earlier incident of domestic violence on another victim that overcomes hearsay issues.

Furthermore, the jury is unlikely to be confused or misled if one or even two uncharged offenses of domestic violence are admitted. Even where the defendant rebuts the offer of the uncharged acts, with explanatory instructions from the judge, the jury will be able to follow the proceedings. The jurors will simply need to understand that the prosecutor wants them to know about an uncharged crime of domestic violence committed by the defendant, and that the defendant either claims he did not commit the uncharged offense or offers some alternative explanation for it. This seems far less convoluted and complicated than the mental gymnastics jurors are currently asked to perform under the limiting instructions for California Evidence Code section 1101(b), which allow jurors to acknowledge the uncharged crime for the purpose of extrapolating, for example, that the defendant had the requisite intent in the instant case, but not whether he had a propensity to commit this type of crime.²⁰²

Concerns about time and efficiency actually favor the approach of Federal Rules of Evidence 413-414 to domestic violence cases. Currently, in each case where there is evidence of an uncharged offense, both the prosecution and the defense must devote a great deal of effort, energy, and resources to write and argue motions in limine as to the admissibility of such acts. With a fairly bright line rule, such as that used in the Federal Rules of Evidence 413-414, the attorneys will be saved some preparation time. Judges will likewise save countless hours trying to determine the exact degree of similarity between the two incidents and trying to predict what the appellate court would decide if the case were before it.

202. See *id.* at 537 n.20; *supra* note 96.

Furthermore, the proposed rule will save time, energy, and money for the justice system. Because the California Evidence Code section 1101(b) similarity tests are so difficult to apply, it is likely that if an uncharged act of domestic violence is admitted, and the defendant subsequently convicted, he will at least attempt to appeal his case on the grounds that the prior act was improperly admitted. This has proven true with rape and sexual molestation cases. It is predictable that as domestic violence is better understood by the judiciary, some judges will see conceptual similarities in the crimes, and others will still demand similarity based upon the facts. Once uncharged acts of domestic violence are admitted under the current scheme, the problem of appellate reversal will occur as it has in the rape and sexual molestation cases. The proposed rule avoids the dual problem of appellate reversals and disparate outcomes by applying the approach used in Federal Rules of Evidence 413-414.

D. Survey Results Confirm Problems With Current Rules

As discussed earlier, the current rules of admissibility for uncharged acts are extremely problematic in the prosecution of domestic violence cases. Although little can be found in the realm of published cases, this conclusion was confirmed by surveying several of the major California District Attorney's Offices.²⁰³ Some offices, such as the San Francisco District Attorney's Domestic Violence Unit, replied that although they frequently have evidence of uncharged domestic violence offenses on other victims, and although they always try to get these acts admitted, the judges almost always exclude them on the basis of California Evidence Code section 1101(a) or California Evidence Code section 352.²⁰⁴ For example, in the case of a domestic violence homicide of a famous bodybuilder by her famous bodybuilder boyfriend, uncharged acts of domestic violence by the defendant on his ex-wife were excluded under California Evidence Code section 352 as too prejudicial.²⁰⁵ Similar responses from other offices confirm that the current scheme of admissibility is not adequately addressing the special need for

203. See Breall, *supra* note 122 (explaining that prior acts of domestic violence are rarely admitted); Craft, *supra* note 106 (explaining that prior crimes of domestic violence are often excluded under *Ewoldt*, except in rare cases with readily identifiable plan of operation similar in both prior and instant offenses); Wills, *supra* note 106 (explaining that although situation does not usually arise, when Los Angeles County prosecutors have attempted to have prior acts of domestic violence introduced, they have been denied because acts were not similar enough). *But see* Gwinn, *supra* note 107 (explaining that they are usually successful in getting prior acts of domestic violence admitted when they can locate the former victim).

204. See Breall, *supra* note 122.

205. Telephone Interview with Peter Cling, Assistant District Attorney for the San Francisco District Attorney's Office (Apr. 5, 1995) (explaining following events in the case of *People v. Kimbrough*: (1) that the prior evidence was initially offered in a motion in limine for the purpose of showing "absence of provocation"; (2) that the evidence was excluded under CAL. EVID. CODE § 352 as not probative enough, until and unless "absence of provocation" was put at issue by the defendant; and (3) that upon "absence of provocation" being put in issue by the defendant, the motion was renewed and finally denied as too prejudicial under CAL. EVID. CODE § 352).

admitting uncharged acts of domestic violence and is not designed to accommodate such cases.²⁰⁶

As described above, the current scheme requires varying levels of similarity that an uncharged and instant offense must share in order to be admitted. Even for the most lenient of the tests (intent), the uncharged act must be similar enough to support the inference that the defendant had the same intent in each instance.²⁰⁷ These tests require similarity based on their *facts*, not on their *concept*. Acts of domestic violence are similar in their concept. They are crimes where the defendant has asserted his power and control over a current or former intimate partner by committing an act of violence against the victim and/or her loved ones. However, to be admissible under the current scheme, the incidents must be similar in terms of their physical facts: where, when, and how the assault occurred.

One published example is the case of *People v. Bufarele*.²⁰⁸ In *Bufarele*, the defendant was on trial for killing his former lover.²⁰⁹ The victim had had an affair with the defendant and then chose to return to her husband. The defendant first threatened her and then retaliated against her by killing her.²¹⁰ The uncharged act that the prosecution sought to have admitted was an *attempted murder* of a different, former lover.²¹¹ This former lover *also* had an affair with the defendant, and then refused to leave her husband to marry the defendant.²¹² The similar situation in which the violence occurred—being intimate with a married woman and then being rejected by her in favor of her husband—and the similarity of the behavior—making threats and then attempting to or actually completing a murder—was considered similar enough to pass the intent test.²¹³

Unfortunately, domestic violence is a broad category of crime. It includes physical abuse along the continuum from a push to murder, as well as threats of harm to the victim herself, her loved ones, her pets, and her property.²¹⁴ Domestic violence also occurs in a great variety of situations. For example, it may occur after a caller with the wrong phone number hangs up, triggering the batterer's paranoid jealousy.²¹⁵ It may occur after the victim has spent an afternoon with her mother or sister, triggering the batterer's desire to control her. And it often occurs when the victim is attempting to end the relationship.²¹⁶ Because of the wide variety in the types of abuse, and the

206. See *People v. Ewoldt*, 867 P.2d 757 (Cal. 1994); *People v. Balcom*, 867 P.2d 777 (Cal. 1994).

207. See *Ewoldt* 867 P.2d at 764 n.2.

208. 14 Cal. Rptr. 381 (Ct. App. 1961).

209. See *id.*

210. See *id.*

211. See *id.*

212. See *id.*

213. See *id.*

214. This definition is broader than that contained in CAL. PENAL CODE § 273.5.

215. This and the following examples are based on crisis calls that I received at the Family Violence Law Center between 1993 and 1994.

216. See *id.*; Mahoney, *supra* note 52.

circumstances giving rise to the abuse, it is unlikely that there will be evidence of an uncharged offense of domestic violence that is similar enough, based on its facts, to be admitted under the current scheme.

In addition, a respected commentator has said that where no specific-intent is involved in the crime, and there is any proof of general criminal intent through the offer of other crimes evidence, the uncharged act serves as nothing but propensity evidence, and therefore should not be admitted.²¹⁷ Following this analysis, only with a specific intent domestic violence crime, such as a threat to kill, could an uncharged act be offered to prove intent. If followed by courts in most domestic violence cases—which are simple assaults and thus general intent crimes—uncharged acts of domestic violence would only be admissible where offered to prove plan or identity, both of which require an even greater degree of similarity for admissibility.

Finally, because the California Evidence Code section 1101(b) tests are so subjective and difficult to apply, defendants in different venues are subject to widely disparate outcomes. For example, according to the San Diego City Attorney's Office Domestic Violence Unit, the judges in their city are "fairly good" about letting in uncharged acts of domestic violence.²¹⁸ Thus, domestic violence defendants in San Diego will be directly confronted with any evidence of abusive behavior in their other relationships. In San Francisco, on the other hand, uncharged acts are far less likely to be admitted, so that a defendant with the same type of violent history could present himself in court as a "nice, peaceful guy," leaving the jury completely ignorant of his patterned brutality.²¹⁹ It is difficult, if not impossible, for judges around the state to agree on which sets of facts meet the low, medium, and high thresholds of similarity.

This disparate impact may in part be due to some judges' greater understanding of domestic violence, and their taking into account the conceptual nature of the crime as opposed to just the factual circumstance of the crime. However, judges who want juries to be able to consider the uncharged acts may also be stretching the categories and thus using the intent, plan, and identity categories as euphemisms for propensity.²²⁰ The proposed rule will provide an intellectually honest, fairly bright line for domestic violence cases and will thereby alleviate these problems.

217. See 2 JEFFERSON CALIFORNIA EVIDENCE BENCHBOOK 1216 (1982).

218. Gwinn, *supra* note 107.

219. Breall, *supra* note 122.

220. See Bryden & Park, *supra* note 135, at 557 n.123.

E. Necessity as a Policy Matter

As previously discussed, there are several problems that arise in prosecuting domestic violence cases. The hurdles that occur prior to trial include the uncooperative or recanting victim, few or no witnesses, and a lack of any documented physical evidence. The problems during a trial include juror mind-block, gender bias, victim credibility, and the generally prejudicial views about domestic violence held by the general population and therefore by most jurors.

Evidence of uncharged domestic violence can overcome many, if not most of these prosecution problems. First, if the prosecution can locate a former victim, they will have a greater chance of gaining her cooperation than that of the current victim. A former victim is less likely to feel physically or economically threatened by the defendant. She is also much less likely to be going through the "honeymoon phase" of the domestic violence cycle. She therefore will not be deterred by hopeful thoughts of reconciliation. If the prosecution is able to locate a former victim and subpoena her to testify, the pressure of being the sole witness/evidence in the case is taken off the current victim, who *is* likely to be in the midst of all of the above issues.

Even if the prosecutor cannot find a former victim, or gain her cooperation, witnesses to the uncharged incident, medical records from the uncharged incident, a 911 tape, et cetera, can be crucial to the prosecution, if hearsay issues can be overcome.²²¹ Because there is generally little evidence other than the victim's testimony, this kind of evidence is exactly what the jury may need to be pushed beyond their socialized skepticism of domestic violence claims. This type of evidence can corroborate the victim's testimony and allay the jurors' fears that the victim may be lying or mistaken. It also helps to concentrate the jurors' attention on the common element—the defendant's behavior—and away from the irrelevant element—the victim's behavior.

Like rapes and sexual molestations, domestic violence prosecutions are often reduced to a swearing match between the victim and defendant. That is, the defendant claims it was an accident, self-defense, or that the victim is lying, and the victim claims it was intentional abuse. As discussed previously, there are many myths concerning the issue of domestic violence, its perpetrators, and its victims. However, for the majority of jurors who hold these beliefs, but who also realize that they may be myths, the uncharged act of domestic violence can be the crucial piece of evidence that moves them past their preconceived ideas about domestic violence victims and batterers.²²²

221. This proposal does not in any way affect the rules on hearsay. A defendant's right to confront and cross-examine witnesses will remain perfectly intact.

222. Cf. Roger C. Park, *The Crime Bill of 1994 and the Law of Character Evidence: Congress was Right About Consent Defense Cases*, 22 FORDHAM URB. L.J. 271, 274-75 (1995) (arguing that where jurors are prejudiced against prosecution, as in consent defense cases, jurors may need to be pushed to lower

As in rape and child molestation cases, "in conjunction with the direct evidence of guilt, knowledge of the defendant's past behavior may foreclose reasonable doubt as to guilt in a case that would otherwise be inconclusive."²²³ The approach taken by the Federal Rules of Evidence 413-414 is justified in the case of domestic violence because it remedies the dilemma which currently exists in domestic violence prosecutions: Jurors will not convict without corroborating evidence, but courts will not allow in evidence for the purpose of corroboration because it might influence the jury "unfairly."

Although the critics will likely argue, as they have with rape and sexual molestations, that these myths no longer exist, and that domestic violence is no longer the unimaginable concept that it used to be, it is my belief that although we have made progress, the myths still prevail. One need only listen to one's colleagues and the media to hear the myths: vehement statements that well respected men cannot possibly be batterers, annoyed questions such as, "If it was really that bad why didn't she leave?" and the overly recited motto, "I can understand not leaving the first time after it (domestic violence) happens, but after that, it's her own fault for staying." Lastly, one need only talk to the victims themselves to affirm the fact that domestic violence myths are alive and well in America.²²⁴

F. Addressing Some Final Criticisms

The critics of the Federal Rules of Evidence 413-414 have expressed dissatisfaction with the standard of proof for uncharged crimes, and would thus likely express the same dissatisfaction if the rule were applied to crimes of domestic violence.²²⁵ They argue that, even if Federal Rules of Evidence 413-414 are accepted, they should: (1) be whittled away to include only convictions, (2) require the higher Federal Rule of Evidence 104(a) standard of proof,²²⁶ and (3) require a *reverse* Federal Rule of Evidence 403 balancing test.²²⁷

First, according to *Wigmore's Evidence*, the rule against admissibility of uncharged acts is based on the notion that they are too prejudicial, and that jurors may give excessive weight to the commission of uncharged crimes.²²⁸

standard of proof to attain *optimal* standard of proof).

223. See Karp, *supra* note 127, at 20.

224. Working with victims and survivors of domestic violence, I repeatedly heard accounts of battered women whose calls for help were ignored by the police, whose requests for restraining orders were denied or returned with a mutual order and a mutual scolding, whose ministers told them to return to their husbands and be better wives, and whose families ignored their bruises.

225. See Leonard, *supra* note 166, at 3; Woo, *supra* note 137.

226. See FED. R. EVID. 104(a) (requiring court to determine admissibility by preponderance of evidence).

227. Under a reverse FED. R. EVID. 403, evidence would be excluded unless its probative value substantially outweighed its prejudice.

228. See 2 WIGMORE, EVIDENCE § 58.2, at 1212 (Tiller rev. ed. 1983)

This is basically a fear of the “bad man theory” as discussed above. However, the courts have recognized the need for admitting certain uncharged bad acts. Under the current scheme of intent, plan, and identity, uncharged similar acts are admissible. Therefore, the system acknowledges that, at least in some circumstances, jurors must be capable of weighing evidence and giving it only its fair share of value. Since such a small number of domestic violence acts pass the current standards of similarity, the current scheme is not serving its purpose in the area of domestic violence. In addition, since most domestic violence is not prosecuted, admitting only prior convictions would be only a tiny improvement over leaving the admissibility rules the way they now stand. Finally, since domestic violence myths still pervade our society,²²⁹ it is less likely that an uncharged act of domestic violence, as opposed to some other uncharged bad act, would be overvalued by a juror.

The use of the 104(b) standard of proof (proof “sufficient to support a finding”) can be defended on several grounds. First, it will be consistent with the standard for admission of uncharged acts offered to prove intent, plan, scheme, or identity under California Evidence Code section 1101(b). Second, this standard of proof is necessary to keep the factfinding power in the hands of the jury. Jurors must listen to the evidence and determine its weight. Should there be weak evidence that the defendant committed the uncharged act of domestic violence, the jurors will discount that evidence. Unlike areas of the law that require the higher 104(a) standard of proof, this process is not counter-intuitive, and does not warrant that higher standard.²³⁰

Finally, my proposed rule explicitly maintains the California Evidence Code section 352 balancing test. The critics’ recommendation of employing a reverse Federal Rule of Evidence 403 (or in this case a reverse section 352) was rejected because this is a rule *based on* the understanding of the importance of and the value in admitting uncharged acts of domestic violence. In fact, even though the balance test is maintained, it will result in very different outcomes. Under the proposed rule, the propensity inference, once deemed a “prejudicial” inference and often used to keep the evidence out, will become a “probative” inference, since it will be specifically approved by the evidence code. With the new rule in place, the California Evidence Code section 352 will only be used to exclude uncharged acts of domestic violence when there is some *other* reason to believe the act is particularly prejudicial, or where one of the other section 352 circumstances, such as “misleading” or “cumulative,” mandate exclusion.

229. See *supra* note 224 and accompanying text.

230. An example of a counter-intuitive situation justifying a heightened standard of proof would be the exclusion of a coerced confession. Even if jurors themselves ultimately made the decision that the confession had been coerced, they would have a difficult time ignoring the contents of confession.

G. Conclusion

Federal Rules of Evidence 413-414 are a progressive and necessary step in the prosecution of rape and sexual molestation crimes. Based on the above discussion, I have shown that a similar approach is a fair, necessary, and useful one to be used in the prosecution of domestic violence cases. I am therefore proposing a California statute for the admissibility of uncharged crimes of domestic violence, committed on the same or other victims, in domestic violence cases.²³¹ It is time to bridge the gap between following the rules of evidence and doing justice.

231. See Appendix A (original proposal); see also Appendices C-E (amended versions).

APPENDIX A

Proposed California Evidentiary Rule of Admissibility for Prior Acts of Domestic Violence, in Domestic Violence Prosecutions

(A) In a criminal case in which the defendant is accused of a crime of domestic violence, evidence of the defendant's commission of another act of domestic violence, against the same or other victim, shall be:

- (1) deemed an exception to § Cal. Code of Evid. 1101(a), and
- (2) may be considered for its bearing on propensity.

(B) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.²³²

(C) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.²³³

(D) This rule shall not be construed as an exception to or a negation of any evidentiary rule except that specifically mentioned in section (A) of this rule.

(E) Where the relevancy of evidence offered under this rule depends upon the fulfillment of a condition of fact, the court shall admit it upon or subject to the introduction of evidence sufficient to support a finding of the fulfillment of the condition.²³⁴

(F) For purposes of this rule, an "act of domestic violence" shall mean any violent or harassing act which was,

(1) committed upon any of the following persons, their family members, or their property:

(a) A spouse or former spouse.²³⁵

(b) A cohabitant or former cohabitant to be defined as: a person who the defendant is living with or has lived together with for a substantial period of time, resulting in some permanency of relationship. Factors

232. Language adopted in part from FED. R. EVID. 413-414.

233. *See id.*

234. Language adopted from FED. R. EVID. 104(b).

235. Language adopted from CAL. FAM. CODE § 6211(a) (West 1994).

which may determine whether persons are cohabiting include, but are not limited to:

- (i) sexual relations between the parties while sharing the same living quarters,
 - (ii) sharing of income or expenses,
 - (iii) joint use or ownership of property,
 - (iv) whether the parties hold themselves out to be husband and wife, boyfriend and girlfriend, or lovers,
 - (v) the continuity of the relationship, and
 - (vi) the length of the relationship.²³⁶
- (c) A person with whom the defendant is having or has had a dating or engagement relationship, regardless of that person's age, sex, or sexual orientation.²³⁷
- (d) A person with whom the defendant has engaged in sexually intimate activity.
- (e) A person with whom the defendant has had a child, where the presumption applies that the male parent is the father of the child of the female parent under the Uniform Parentage Act (Part 3 (commencing with Section 7600) of Division 12).²³⁸

236. Language for section (F)(1)(b)(i)-(vi), adopted in part from CAL. FAM. CODE § 6209 and from CAL. PEN. CODE § 13700(b) (West 1994).

237. Language adopted in part from CAL. FAM. § CODE 6211(c) (West 1994).

238. Language adopted in part from CAL. FAM. § CODE 6211(d)(West 1996).

APPENDIX B

Survey Questions

The following is a survey that I sent out to several District and City Attorneys in California. Of the seven surveys that were sent out, five were responded to either by mail or by phone, in whole or in part. Surveys returned were from the San Francisco, San Diego, and Los Angeles County District Attorney's Offices and from the San Diego and Los Angeles City Attorney's Offices. Surveys not returned were from the Alameda District Attorney's Office and from a former Alameda Deputy District Attorney.

A Few Clarifying Points:

- 1) I am interested in answers concerning prior: convictions, criminal charges which were subsequently dismissed or resulted in an acquittal, and mere allegations. If your answers are different for each of these categories, please specify the type of prior to which you are referring.
- 2) Even if you do not have statistics at your disposal, your estimations and thoughts will be extremely useful to me.

*Questions:*²³⁹

- 1) How often does the following issue arise: You are trying a domestic violence case and you seek to admit evidence about a prior offense of domestic violence committed by the defendant on a *different* victim? If your answer is "never" or "not often" please explain if that is due to a lack of prior offenses, a lack of information about prior offenses, the court's prior rulings on such offenses, or some other explanation.
- 2) How often does the following issue arise: You are trying a domestic violence case and in your *case in chief* you attempt to offer a prior offense of domestic violence committed by the defendant on a *different* victim but are prevented on the basis of California Evidence Code § 1101(a) or (b)?
- 3) (a) How often does the following issue arise: You are trying a domestic violence case and in your *rebuttal* you attempt to offer a prior offense of domestic violence committed by the defendant on a *different* victim, under a California Evidence Code § 1101(b) exception, but are prevented?
 - (b) On what basis are you denied (i.e., not similar enough, too remote, too prejudicial)?
 - (c) Does your answer to (a) depend upon the defense offered by the defendant? If so, please separate your answer for the most common

239. Responses on file with author.

defenses such as accident, self-defense, victim is lying, or any others that you feel are significant.

4) Are you aware of any California Supreme Court or Appellate Court opinions which admit or deny the admissibility of prior acts of domestic violence on *other* victims on the basis of California Evidence Code § 1101(a) or 1101(b)(other than *People v. Archerd* and *People v. Bufarele*)?

5) Have you tried or has anyone in your office tried a domestic violence case which:

- did not result in a conviction
- and where a prior act of domestic violence on a *different* victim was not admitted
- and in your opinion had the prior been admitted, it could have had an impact on the jury resulting in a more favorable outcome?

If so, please indicate the docket number and any other information which you think might assist me in locating the transcript, motions, etc.

APPENDIX C

California Senate Bill No. 1876
February 22, 1996 Version

SECTION 1. Section 1101 of the Evidence Code is amended to read:

1101. (a) Except as provided in this section and in Sections 1102, 1103, and 1108, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion.

(b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act , *or when relevant to prove the disposition of a defendant in a criminal action to engage in criminal conduct against a particular individual.*

(c) Nothing in this section affects the admissibility of evidence offered to support or attack the credibility of a witness.

APPENDIX D

California Senate Bill No. 1876

April 8, 1996 Version

SECTION 1. Section 1101 of the Evidence Code is amended to read:

1101. (a) Except as provided in this section and in Sections 1102, 1103, ~~and 1108-1108, and 1109~~, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion.

(b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act (1) when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act, or (2) when relevant to prove the disposition of a defendant in a criminal action to engage in criminal conduct against a particular individual.

(c) Nothing in this section affects the admissibility of evidence offered to support or attack the credibility of a witness.

SEC. 2. Section 1109 is added to the Evidence Code, to read:

1109. (a) *In a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other domestic violence is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352.*

(b) *In an action in which evidence is to be offered under this section, the people shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least 30 days before the scheduled date of trial or at a later time as the court may allow for good cause.*

(c) *This section shall not be construed to limit the admission or consideration of evidence under any other section of this code.*

(d) *As used in this section, "domestic violence" has the meaning set forth in Section 6211 of the Family Code.*

APPENDIX E

California Senate Bill No. 1876

May 14, 1996 (Final) Version

SECTION 1. Section 1101 of the Evidence Code is amended to read:

1101. (a) Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion.

(b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act ~~(1) when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act, or (2) when relevant to prove the disposition of a defendant in a criminal action to engage in criminal conduct against a particular individual~~ *such an act*.

(c) Nothing in this section affects the admissibility of evidence offered to support or attack the credibility of a witness.

SEC. 2. Section 1109 is added to the Evidence Code, to read:

1109. (a) ~~In~~ *Except as provided in subdivision (e), in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other domestic violence is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352.*

(b) In an action in which evidence is to be offered under this section, the people shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least 30 days before the scheduled date of trial or at a later time as the court may allow for good cause.

(c) This section shall not be construed to limit *or preclude* the admission or consideration of evidence under any other ~~section of this code statute or case law~~.

(d) As used in this section, "domestic violence" has the ~~meaning set forth in Section 6211 of the Family Code~~ *meaning set forth in Section 13700 of the Penal Code*.

(e) *Evidence of acts occurring more than 10 years before the charged offense is inadmissible under this section, unless the court determines that the admission of this evidence is in the interest of justice.*

